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U.S. Congress. House.

Title:
Regulation of railroad holding companies

Place:
Washington, D.C.

Date:
1932

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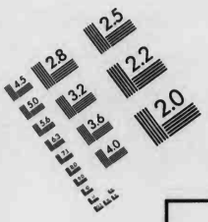

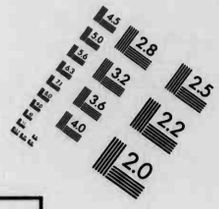

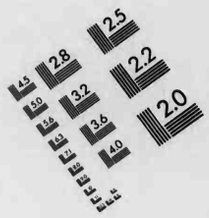

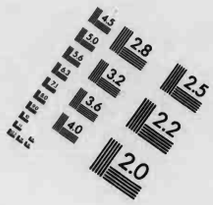

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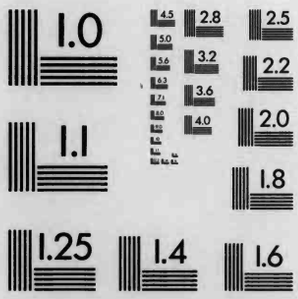

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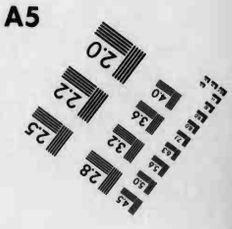

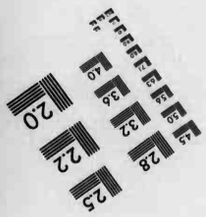

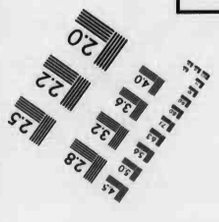

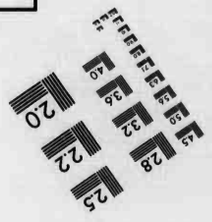

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BEFORE

THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

SEVENTY-SECOND CONGRESS

FIRST SESSION

ON

H. R. 9059

TO AMEND SECTION 5 OF THE INTERSTATE COMMERCE ACT, AS AMENDED, RELATING TO THE CONSOLIDATION AND ACQUISITION OF CONTROL OF CARRIERS BY RAILROAD, AND FOR OTHER PURPOSES

FEBRUARY 17, 18, 19, 23, 24, MARCH 1, 15, 16, 17, 23, AND 24, 1932

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HOUSE OF REPRESENTATIVES

SEVENTY-SECOND CONGRESS, FIRST SESSION

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REGULATION OF RAILROAD HOLDING COMPANIES

WEDNESDAY, FEBRUARY 17, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF WALTER M. W. SPLAWN, SPECIAL COUNSEL FOR THE INTERSTATE AND FOREIGN COMMERCE COMMITTEE, UNDER H. R. 114

The CHAIRMAN. The hearing has been called on H. R. 9059 to regulate railroad holding companies.

(H. R. 9059 reads as follows:)

[H. R. 9059, Seventy-second Congress, first session]

A BILL To amend section 5 of the Interstate Commerce Act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the interstate commerce act, as amended (U. S. C., title 49, sec. 5), is amended by striking out paragraphs (2) and (3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively.

SEC. 2. Such section is further amended by striking out paragraphs (6), (7), and (8) and by inserting in lieu thereof the following paragraphs:

"(4) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock:

"(A) The proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and shall be approved by the commission.

"(B) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this paragraph, the carrier or carriers or corporation seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the commission finds that the public interest will be promoted by the transaction proposed and that the conditions of this section have been or will be fulfilled, it may enter an order

approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe.

"(C) Whenever a corporation which is not a carrier is authorized, by an order entered under subparagraph (B) of this paragraph, to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such pargaraphs, be considered as a common carrier sujbect to the provisions of this act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a 'carrier' as such term is defined in paragraph (1) of such section, and be treated as such by the commission in the administration of the paragraphs specified. In the application of such provisions of section 20a in the case of any such corporation the commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

"(5) (a) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated in violation of this paragraph. As used in this paragraph, the words 'control or management' shall be construed to include the power to exercise control or management.

"(b) For the purposes of subdivision (a), but not in anywise limiting the application thereof, any transaction shall be deemed to accomplish or effectuate the control of management in a common interest of two carriers—

"(A) If such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

"(B) If such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

"(C) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(c) For the purposes of subdivision (b) a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(d) The commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of subdivision (a). If the commission finds after such investigation that such person is violating the provisions of such subdivision, it shall by order require such person to take such action as may be necessary, in the opinion of the commission, to prevent further violation of such provisions.

"(e) For the purposes of this paragraph, wherever reference is made to control it is immaterial whether such control is direct or indirect.

"(6) For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith, the commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether the holding

by any person of any part of the stock or other share capital of any carrier (unless acquired before February 28, 1920, or unless acquired with the approval of the commission) is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier. If the commission finds, after such investigation, that such holding has or is likely to have any of the effects so described, it shall by order require such person to divest himself of such stock or other share capital, or of the voting power thereof, to the extent, within the time, and in the manner prescribed by the commission as necessary for the protection and furtherance of such plan. The commission, in its order requiring any such divestment, shall provide for a trust agreement for a limited period or for other appropriate measures for the purpose of enabling such person to realize at least the fair normal market value of such stock or other share capital. Nothing in this paragraph shall be construed as constituting an exclusive method for compelling the divestment of stock or other share capital, if it has been acquired in violation of any other provision of law.

"(7) If in the course of any proceeding under paragraph (4) or (6) before the commission, or of any proceeding before a court in enforcement of an order entered by the commission under either of such paragraphs, it appears that since the beginning of such proceeding the plan for consolidation has been reopened under paragraph (3) for changes or modifications with respect to the allocation of the properties of any carrier involved in such proceeding, then such proceeding shall be suspended until the commission has made its decision under such reopening of the plan.

"(8) The district courts of the United States shall have jurisdiction upon the application of the commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

"(9) The commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (4), (5), or (6), as it may deem necessary or appropriate.

"(10) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by such order.

"(11) If any provision of the foregoing paragraphs, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

"(12) As used in paragraphs (4) to (11), inclusive, the term 'person' includes an individual, partnership, association, or corporation, and the term 'carrier' means a carrier by railroad subject to this act."

SEC. 3. Such section is further amended by renumbering as paragraph (13) the paragraph added by the act entitled "An act to amend section 407 of the transportation act of 1920," approved June 10, 1921, and by renumbering the remaining three paragraphs as paragraphs (14), (15), and (16), respectively.

SEC. 4. The provisions of the interstate commerce act, as amended, as in force prior to the enactment of this act, shall remain in force, as though this act had not been enacted, with respect to the acquisition by any carrier, prior to the enactment of this act, of the control of any other carrier or carriers.

Mr. ALFRED P. THOM, general counsel, American Railway Executives Association. Mr. Chairman and gentlemen, before the hearing begins I would like to have the privilege of submitting some remarks in regard to the procedure, not in regard of course to the merits of the proposed bill, which, in due time everybody will have an opportunity in the course of the hearings to be heard upon.

When I heard that there was to be a hearing on the holding companies, I concluded that that was the subject, and the main subject, to be considered. Consequently, it was only a few days ago that I had an opportunity to read H. R. 9059, which goes, in my judgment, far beyond the question of holding companies, and introduces the exceedingly important question of consolidation.

It undertakes to deal with consolidations, by crystallizing into the law the method of a plan which has been advised against by the Interstate Commerce Commission for about ten years, and which is now under consideration by the commission.

The CHAIRMAN. Mr. Thom, you are going into the merits of the bill.

Mr. THOM. I do not intend to go into the merits.

The CHAIRMAN. I thought that you were going to discuss the procedure.

Mr. THOM. I am not going into the merits; I am just going to state the proposition.

But, I say, on that plan, the first time it is invoked, it is under attack before the commission itself.

Now, for years the railroads have had very earnest convictions on this subject of consolidations. They have scented conditions, apparently, which have made the subject even of larger importance than they first supposed, and this committee has had that matter under consideration, and in 1928 made a report to the House, rejecting the present plan that is now continued in this bill. In that report the committee proposed a new one.

Now, manifestly, if this subject is to be brought up that will bring into this probelm that you have before you all of the railroads' views in respect to this matter of consolidations. We shall have to ask you to consider very earnestly that whole fundamental subject and, therefore, we hope that that matter will not be precipitated, especially, in view of the fact that even as to holding companies, what is complained of generally in the public press is now submitted to the Interstate Commerce Commission for its approval or disapproval.

I want to bring to the attention of the committee that this bill, 9059, presents two problems, one, the holding company problem, which perhaps affects few people only, and the other, the consolidation problem, which affects all of the railroads, and, therefore, will bring into this controversy that question which the chairman knows, and all of the members of the committee who were then members know, is one of major importance. I wish, therefore, to submit that that problem should be not treated in the same bill that the holding company matter is treated in.

Mr. IGOE. I make a motion that the hearing on H. R. 5009, holding company bill, be deferred until such time as the Interstate Commerce Commission announces its decision in the so-called four-system eastern consolidation application case, and this committee take up H. R. 7329, the motor bus transportation bill and start the hearings on that.

The CHAIRMAN. Who introduced that bill?

Mr. IGOE. Mr. Huddleston.

Mr. NELSON. That motion comprises two questions in one.

Mr. IGOE. All right, I will make the motion that we defer hearings on H. R. 9059.

The CHAIRMAN. Well, we have to consider those matters in executive session, if we are going into the matter here.

Here is a matter that has been advertised in the press, that we were going to have hearings on, for more than a month. I deferred this hearing from the middle of January until now in order to accommodate some people who said that they were tied up before the Interstate Commerce Commission.

Now, if this thing is to be fought out in the committee now, we will have to ask you gentlemen to retire, and we will settle this procedure.

I thought that everybody understood—well, we will take that up in executive session.

(Thereupon, everyone except the committee and the officials of the committee retired from the room, the committee went into executive session. Subsequently, at 10.47 o'clock a. m., the executive session being concluded, the following proceedings were had:)

The CHAIRMAN. The committee will come to order.

All right, Doctor Splawn, you may proceed.

Mr. SPLAWN. Mr. Chairman and gentlemen of the committee: My name is Walter M. W. Splawn. I was retained by this committee as special counsel during the investigation of the stock ownership in railroads.

I come before you this morning, not as a prosecutor of the railroad holding company. You retained me in connection with this investigation to find the facts, and what I shall say this morning is a statement of fact and somewhat supplementary to a summary of the report which you will find on pages IX–LXXXVII in volume 1 of House Report No. 2789, Seventy-first Congress, third session.

I want, very briefly, to review the developments of the holding company generally. What is a holding company? The holding company may be defined as any company which, by virtue of its ownership of securities, is in a position to control or substantially influence the management of one or more other companies. That is, a holding company is different from a mere investment company. An investment company buys securities as any investor would do and without any purpose of determining the policy of the management. But when a company, by virtue of its ownership of securities, is in a position to control or substantially to influence the management of another company, we can say that is a holding company.

Now, let us look to the development of the holding company in this country.

Mr. BECK. Mr. Chairman.

The CHAIRMAN. Mr. Beck.

Mr. BECK. Mr. Splawn, you are a very competent man and counsel. Would you tell us what your idea is as to the proportion of stock that manifests such control as that of which you speak?

Mr. SPLAWN. You recall, Judge Beck, in the Union Pacific case, that the Supreme Court pointed out that about 40 per cent of the stock might constitute a working control, but technically, a majority is, required. As a practical proposition the Supreme Court has found that an actual majority is not necessary.

Mr. BECK. But they also found that in a few phases—they passed on so many different questions in that case—that about 40 per cent would measure the volume necessary for control. Yet, Mr. Have-

meyer controlled the sugar refining company and only owned 200 shares of stock; but did that because of the man's power and personality, and I suppose more powerful backing of his associates.

Mr. SPLAWN. That would not put him in the position of a holding company. A good many other men, as you well know, are through their proxy committees able to hold the actual control by carrying on campaigns among the stockholders for proxies; but that is a very different thing from having the power to vote the stock in one's own right without consulting stockholders and without getting proxies.

Mr. BECK. Is it not a fact that, to a very large extent, that probably power to control does not entirely depend upon the amount of the stock holdings, but the fact that the owners of the stock—holders of the stock—do not vote their stock? Ten per cent can be the controlling interest, when 85 per cent does not take the pains to vote.

Mr. SPLAWN. Well, I think the Supreme Court had that in mind to some extent in what it said. When one interest has enough of the stock that it can vote as it sees fit, which added to the stock that will come in without any thought on the part of the stockholders will give control, then that ownership constitutes a working control even though it were not a majority of the stock.

Mr. BECK. There was an election that took place in New York two days ago. I know nothing about it. I am referring to the Trans-America, or whatever it is, which I recall. The two contending parties, one had 49 per cent of the stock, and the other had about 51 per cent, so that 49 per cent in that case was not sufficient to control. On the other hand, I think we are quite right in assuming that only one-tenth of the stock may measure control when the people owning the other 90 per cent of the stock do not take sufficient interest to vote it.

So, I can not see how any court can ever hold that a given percentage means control, because it depends upon the facts of each particular case.

Mr. SPLAWN. I think that is what the Supreme Court did in the Union Pacific case. It considered the facts in that particular situation.

Mr. BECK. Pardon me for interrupting you.

Mr. SPLAWN. I am glad for you to ask questions.

The holding company is of recent origin and development. There are examples of corporations having been authorized by state legislatures to acquire stock of other companies before the middle of the nineteenth century. Between the years 1868 and 1872 the legislature of Pennsylvania granted charters by special acts to more than 40 corporations authorizing each company to hold and own securities of other companies. Some of these charters are still in use by very powerful corporations. Under an act of the legislature of the State of Maryland in 1833, the Baltimore & Ohio Railroad was authorized to subscribe to the stock of the Washington Branch Road and thus became a parent company, perhaps the first in the United States.

When I speak of a parent company here, I mean a corporation which is an operating company, which owns the stock of another company. A pure holding company is a corporation which is not an operating company, but which owns the stock of companies which are operating companies.

By 1881, the Western Union Telegraph Co. had acquired stock interests, and, in most cases, a majority of the voting stock in other

telegraph companies, and, by that means, had gained control of its most important competitors. The Pennsylvania Co. was chartered in 1870 and is perhaps the first case on record of a pure holding company. The first pure holding company in the utility field seems to have been the American Bell Telephone Co., which was created in Massachusetts by special charter in 1880. From 1887 to 1893 the State of New Jersey took action which pointed the way to authorization of corporations to acquire and deal in the securities of other companies by authority of the general incorporation laws of a state.

Prior to this action by New Jersey, no State had allowed a company organized under its general incorporation laws, to hold stocks in other corporations. In fact, some States definitely forbade intercorporate stock holdings. In the majority of States, where early incorporation laws made no mention of this matter, the question whether or not a company had an implied power to hold stock was sometimes referred to the courts. In most of the States it was held that, with certain exceptions, corporations had no such implied power, the decisions being based largely on the ground that the purchase of stock in a second corporation involved the investment of funds in a new and distinct enterprise. This was an investment not contemplated by the stockholders of the purchasing company and was foreign to the objects of its creation.

The change initiated by the New Jersey Legislature did not take place overnight. For some years only a few corporation lawyers, faced with the problem of finding a substitute for the ill-fated trust, were bold enough to advise their clients to try out the new and legally untested statute permitting one corporation to own the stock of another corporation. For a good many years, particularly through the the nineties, after New Jersey had pointed the way to legalizing the holding company, combinations were brought about through purchase of assets, merger, or amalgamation, with two or three notable exceptions.

In the next 5 or 10 minutes, I would like to call attention to the use of the holding company in the industrial field, and in the banking field, in order to point out the distinctions of use that is made of it in the railroad and utilities field that you do not find in the banking or industrial field.

THE INDUSTRIAL HOLDING COMPANY

The form of combination in the industrial field has been more or less influenced in almost every case by State and Federal antitrust laws. In the field of the public utilities the antitrust laws have not been of such importance in determining the choice of a legal device for combination for the reason that public utilities are generally accepted as monopolistic in character. While among the railroads the antitrust laws have had to be considered by managements planning unifications of two or more properties, the State and Federal Governments having been increasingly favorable to limiting competition. In industry there has been a definite policy to check the growth of monopoly. The use of the pool was as popular during the seventies among the industrialists as among the railways, but it declined in importance during the eighties and nineties because it involved agreements between the member companies which could not be enforced and which were outlawed by State legislatures and

the Congress. The trust which flourished during the eighties was definitely outlawed in 1890 by the court decree in Ohio, dissolving the Standard Oil Trust, and by decrees in New York directed to the Sugar Trust. With the pool and the express trust definitely outlawed, there remained the community of interests, which could not readily be reached through antitrust proceedings, and outright fusion through amalgamation, merger, or purchase of assets.

After the States began to follow the lead of New Jersey in organizing corporations to own stocks in other companies, the holding company became available as a means of combination. Out of 11 of the largest consolidations alleged to be seeking monopolies, which were formed between 1887 and 1897, only one, the American Cotton Oil Co., in 1889, made use of the holding company. In the years 1898 and 1899, when so many combinations were formed, of 41 of the most important industrial consolidations only six appeared to have been holding companies, the most important of which was the reorganized Standard Oil Co. From 1900 to 1903, 16 of the 29 important consolidations turned to the holding company. The year 1901 gave the country the American Locomotive Co., the Consolidated Tobacco Co., the Eastman Kodak Co., and the United States Steel Co.

A temporary check to the use of the holding company came in 1904 by reason of the decision of the Supreme Court in the Northern Securities case, 193 U. S. 197. For the next 10 years very few important consolidations took place. One of the most important in 1908 was the General Motors Co., which did not seek a monopoly.

In 1914 the Clayton Act was passed which forbade combinations through the acquisition by one corporation of the stock of another where the effect of such acquisition may be to substantially lessen competition or to restrain commerce or to tend to create a monopoly. In 1911 the Supreme Court, in deciding the cases against the Standard Oil Co. and the American Tobacco Co., 221 U. S. 1, and 221 U. S. 106, had definitely checked combinations seeking complete monopoly. Section 7 of the Clayton Act made it illegal for a corporation to acquire the stock of another company engaged in interstate commerce where the acquisition might result in a substantial lessening of competition or any restraint of commerce or any tendency toward the creation of monopoly.

The Clayton Act did not outlaw combination, but a particular form of combination. The effect of the Clayton Act, therefore, was to discourage the use of the holding company in the field of industry and to force the use of amalgamation, merger, or purchase of assets as a means of consolidation where the result would be substantially to lessen competition or a step toward monopoly. Where the combining companies have been noncompeting, or have not engaged in interstate commerce, the holding company has been utilized, as by some of the copper companies in buying brass manufacturing plants to afford an outlet for their product. Less than one-third of the leading industrial combinations of the country are now held together by holding companies, more than half of which have been formed during the past 10 or 12 years.

CHARACTERISTICS OF THE INDUSTRIAL HOLDING COMPANY

Pyramiding or the use of a chain of holding companies to enable those at the top to hold control with a minimum of investment is not the practice in the industrial field. The tendency is for the industrial holding company to acquire practically all the stock of its subsidiaries. There are a number of cases where the holding company has continued acquisition of minority interests long after it has acquired a substantial majority.[1]

Another characteristic of the holding company in the industrial field is its use to achieve the benefits of decentralization in administration. As the business units have increased in size and complexity, one executive function after another has been delegated until the individuals actually in control of large corporations have few purely executive functions to perform. The board of directors and chief officials become a policy forming group. The president performs only the most ultimate executive functions and frequently none which he can safely delegate. Some of the great industrial combinations resort to divisions and departments after the manner of a military organization. Where the holding company is used, each department may be a separate corporation. In this way, much can be accomplished by way of decentralization.

A third characteristic of the holding company in the industrial field is its use in bringing about consolidation. Holding companies may be formed to acquire the stocks of other companies as the initial step toward a merger or amalgamation.

THE BANKING HOLDING COMPANY

Although the use of the holding company in the banking field has come into prominence since 1928, it existed certainly as early as 1903. In 1909, the commissioner of banking of Wisconsin recommended legislation to discourage the use of the holding company in the banking business in his State. At the end of 1929 a total of 287 banking chains or groups were in operation embracing 2,103 banks, with total loans and investments in excess of $11,000,000,000, or approximately one-fifth of the total loans and investments of all the banks in the country. Banks operating in chain or group systems in 1929 included 802 national banks, 136 State banks which were members of the Federal reserve system, and 1,165 banks which did not belong to the Federal reserve system.

These principal banking groups are of two types: first, those where a group is controlled by a principal bank. In groups of this type the total loans and investments, with two or three notable exceptions, did not reach $40,000,000 in 1929, though there are two instances where the group in that year had loans and investments to the amount of $450,000,000, and $500,000,000. The second type is where the group is controlled by a holding corporation. In this type the total loans and investments of a typical group were in excess of $400,000,000, and in one case amounted to almost $1,500,000,000.

Arguments advanced in behalf of the banking holding company are, in the main:

[1] Standard Corporation records, Oct. 16, 1929, p. 962; Aug. 19, 1930, p. 4760, Mar. 20, 1930, p. 6203. Moody's Industrial Manual, 1929, pp. 2397, 2879, 3076.

1. That it eliminates the dangers inherent in small banks.
2. Group banks are supposed to be able to offer better and more extensive services to customers than can independent banks.
3. Group banking increases the mobility of funds.
4. Expansion in other fields of business has made large-scale banking desirable.

The arguments against the banking holding company may be summarized as follows:

1. The difficulty of proper examination of group banks.
2. Under group banking, smaller towns and cities are deprived of banking credit for the benefit of the large financial centers.
3. Group banking may result in an undesirable concentration of credit.
4. It introduces a speculative element into banking.
5. Large group banks may prove the undoing of the Federal reserve system.
6. Through the holding company, the double liability provisions for protection of depositors may be defeated unless the holding company has actual capital and surplus that amount to twice the par value of the banking stock held.

While in some instances a bank may be controlled by the holding company which owns only a bare majority of the bank's stock, this is not usually the case. An ownership of more than 90 per cent of bank stock by a holding company is typical. Since the voting stocks of banks, as a rule, represent their entire capitalization, though in some cases nonvoting stock has been issued, and since the banking holding company ordinarily undertakes to get possession of all the stock, there is very little use of the holding company as a means of pyramiding in the banking field.

So, in the field of industry and in the field of banking, we do not find that the holding company is ordinarily used for pyramiding, that is, for getting control of a maximum of the assets of operating companies with a minimum of investment by the top holding company.

The present interest of this committee in the holding company grows out of the use of the holding company in connection with the consolidation of railroads. It was because the Interstate Commerce Commission, the administrative arm of the Congress in regulating the railroads, represented to you that the holding company was being used to defeat the object you had laid down in section 5 of the act to regulate commerce as amended, and, because they asked for an investigation you drew H. R. 114, Seventy-first Congress, second session, which, at your request, the House of Representatives passed. Under the authority of that resolution, you have made a comprehensive and searching study of the relations of the holding company to the railroad operating companies, particularly with reference to the effect on consolidation.

Since the problem now before you is one related to the general question of railroad consolidation, a few minutes may be spent in reviewing the whole matter of unification of railway properties into fewer systems.

From war time experience in the operation of railroads, it was claimed that economies of large-scale management had been demonstrated. Writers of the standing of Profs. William Z. Ripley and

W. J. Cunningham have called attention to the economies which were believed to have resulted from Federal control. Such economies were traceable, first, to unification and standardization:

Joint use of passenger and freight terminals.
Joint use of yards and engine houses.
Consolidation of car inspection forces.
Joint use of running tracks.
Joint use of motive power and cars.
Short-routing of freight.
Diversion of export traffic to southern ports.
Consolidation of city ticket offices.

Second, there were economies from the simplification of accounting; third, standardization of operating statistics; fourth, the curtailment of passenger service and the consolidation of ticket offices; fifth, the saving in handling of freight as a result of the "Sailing day plan."

All of these economies were urged before this committee, and the Senate Committee on Interstate Commerce, when the consolidation paragraphs of section 5 were being considered in 1920.

Prof. W. M. Daniels formerly of the Interstate Commerce Commission, in 1924, said in substance:

> The new public policy laid down in section 5 of the act to regulate commerce, as amended, may be described positively as covering, first, the anticipation of economies and improvements in service to result from large scale production in transportation; and second, the substitution of the prospect of a moderated but a supposedly well-assured rate of return upon future railroad investments in place of the previous unrestricted opportunity afforded investors of assuming risks and taking their chances of whatever profit or loss might ensue.
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> During the year 1923, as a member of the Railroad Commission of Texas, I followed and participated in the hearings held throughout the country that year by the Interstate Commerce Commission after it had adopted its tentative plan of consolidation two years before. I not only studied the voluminous record made in the hearings and the arguments on the tentative plan, but I went back and examined the hearings before this committee and the Senate Committee on Interstate Commerce when the transportation act of 1920 was under consideration. From a careful examination of the hearings before these committees of the Congress, I was led to the conclusion that Congress adopted the policy of consolidating the railroads of the continental United States into a limited number of systems primarily for the purpose of saving nonprosperous roads to a continued service of their constituents. The chief explanation then of the consolidation law, is the belief of Congress, at the time it was enacted that grouping would make rate adjustments easier because, under a grouping, uniform rates would apply to the systems in a given region and within these systems there would be the weak and strong properties, not as separate entities, but as the properties of a single corporation. Congress undoubtedly believed that suspension of service on weaker lines might be prevented, and that the carriers which were in financial difficulties might be assisted through orderly and well-advised consolidations. Accordingly section 5 was amended as it now appears on the statutes.
>
> On August 31, 1921, the Interstate Commerce Commission submitted its tentative plan for the consolidation of railroads of the continental United States into a limited number of systems. In the main it followed the recommendations of Prof. William Z. Ripley in his remarkably able report now widely distributed. On September 28, 1921, the tentative plan was served on the carriers and other parties of interest. On March 21, 1922, notice was formally given by the Interstate Commerce Commission that a conference was to be held on April 24, with respect to the southeastern systems.

That was about 10 years ago.

> On April 24, very little progress was made on account of the misunderstanding as to the evidence required.

I should say very little progress was made in making the record. A good deal of progress was made in arriving at an understanding as to what the record should contain.

The southeastern carriers appeared on that day without much evidence and apparently with very little understanding as to what was wanted. Commissioner Hall at some length discussed the desirability of having facts put in the record which would be of assistance to the commission. Among other things he said: "We are simply taking the statute as we find it. * * * The commission certainly will not desire to exact from carriers a lot of information that will be of no value. The commission wants the aid of your judgment as to what will be of value * * * assuming the beneficent purpose of Congress * * * how shall we best build up a record here that will serve as a firm foundation for whatever may be done hereafter."

Obviously the carriers up to this initial hearing in April, 1922, had not taken consolidation very seriously. After the commission had spoken in no uncertain terms as to its purpose to have a satisfactory record, the carriers fell in line and cooperated throughout the long hearings on the tentative plan. After a conference among the carriers, and through their committee with the commission, it was agreed that a part of the record should consist of maps of each railroad and its terminals, a statement of mileage, data showing the amount and character of equipment, a comprehensive statement as to important terminals, a careful analysis of traffic, a showing as to bases of fuel supply, a statement showing results of operation, and a careful analysis of capital obligations. The public participated very freely in these hearings which were held at different points throughout the United States. All in all, the commission sat 83 days in taking testimony and 6 days in hearing arguments. The arguments were held from January 7 to 12, inclusive, 1924, before the full commission. February 9, 1924, was set as the last day on which briefs could be filed and as the date on which the proceedings should be submitted for decision. Splawn: Consoli&ation Railroads, p. 185.

As a result of these extensive hearings and of the studies made by the carriers in order to complete the record required by the commission, the carriers became very well informed as to the possible economies and operating advantages which would accrue from consolidation as provided by the Congress. The leading railway executives and financiers apparently were convinced that great advantages, particularly in operation and as affecting service, would follow a well-considered series of railway consolidations. The interest taken by the shippers and the public revealed that much was expected, and that four principal results from consolidation were anticipated by the public: First, the preservation of service on many thousands of miles of weak railroads; second, some economies in operation resulting in possible reductions of freight rates; third, a great improvement in quality of service; and fourth, balancing the systems with reference to equality of opportunity and competitive strength.

All of these objectives had been considered by Congress when the consolidation provision was written into the act to regulate commerce. As time has passed it has appeared that there is not so much foundation for hope of decreasing freight rates as a result of economies which may flow from consolidation. But it has appeared as more and more evident that consolidation is necessary in order to preserve and properly to utilize a substantial portion of the entire railway mileage of the country; and, second, that the improvements in the quality of service could be perhaps greater than most operating officials had thought in 1922 and 1923. The economies that can be effected, while not as great as was at first hoped, have appeared to be substantial enough to justify the serious consideration which has been given to the whole matter of consolidation. P. LXXXV, House Report No. 2789, 71st Congress, 3d Session.

The carriers are coming seriously with applications to the commission and proposing to take in these weak lines. Now, the managements of the prosperous lines were not particularly influenced by this argument, which was so persuasive with the Congress, that the weak lines could be saved by incorporating them into the strong systems. That particular argument has not been advanced by them, with the exception of a few railway executives who are statesmen and who look at the railway problem as a national problem and not as merely of their own private corporations. From time to time, on their specific applications, they have said in substance "We will take in certain weak lines if you will grant our applications to unify." That is, they have seen in the unifications sought advantages sufficient to compensate them for the disadvantages to the corporation of adding these weak lines. Of course, in some instances, a line that is weak of itself may be a desirable property for a system. The system may see advantages to itself in taking over a particular property.

It has become increasingly apparent that the fourth objective can be attained, and systems can be worked out well balanced as to their own internal structure and with respect to each other.

Paragraph (2) of section 5 of the act to regulate commerce provides for the acquisition of control by one carrier of another, either under a lease or by the purchase of stock, or in any other manner not involving the consolidation into a single system for ownership and operation, which the commission shall find to be in the public interest.

By this and related paragraphs Congress provided a complete scheme of regulation of contracts or other arrangements whereby one carrier subject to the act might obtain control of another, either by consolidation or in some manner not involving such consolidation, or by entering into any agreement for the pooling of freight or earnings with a competing railroad. That is, Congress intended to permit unified operation of common carriers, even if it involved the elimination of competition, when the unification would be in the public interest, and provided for a modification of the antitrust laws to the extent necessary stating certain prerequisites, and imposed on the commission the duty of determining whether the conditions of this section have been or will be fulfilled and whether a proposed arrangement is in the public interest. (Valley Term. Ry. lease, 65 I. C. C. 105.)

"In the development of the transportation act, 1920, from which this and related paragraphs were drawn, great importance was attached by Congress to the ultimate consolidation of the carriers. It was intended that complete control over the situation should be in the commission's hands, so that the working out of a constructive policy might be safeguarded and consolidations or other unions of interest might not be effected without the consent of the commission."

Now, that language was used by the commission itself in passing upon an application of the Pittsburgh & West Virginia Railway Co. securities application (70 I. C. C. 682), and that particular order of the commission was carried to the courts and the order sustained (Pittsburgh & West Virginia Ry. Co. *v.* Interstate Commerce Commission, 293 Fed. 1001), and the case was dismissed by the Supreme Court on motion (266 U. S. 640, 69 L. ed. 483, 45 Sup. Ct. Rep. 124).

THE PUBLIC INTEREST

In the numerous and important applications for acquisition of control which have been before the commission under paragraph (2), it has given much consideration to what is in the public interest. These considerations appear under several headings (Interstate commerce act, annotated, vol. 2, pp. 1359ff):

Acquisition by one carrier of control of another authorized.—By lease, when it would relieve both carriers of the necessity of formal compliance with the requirements of section 10 of the Clayton Antitrust Act (U. S. Code, title 15,

section 20), which was technically applicable under the past status. (Chesapeake & O. Ry. Co. of Indiana Lease, 70 I. C. C. 694.)

Continuance of prior operating arrangements.—Acquisition of control authorized, as a means of continuing a prior operating arrangement deemed in the public interest. Chesapeake & O. Ry. Co. of Indiana lease, 70 I. C. C., 694; Pittsburgh, C., C. & St. L. R. Co. lease, 72 I. C. C. 128; Grand Rapids & I. Ry. Co. lease, 72 I. C. C. 260; Dodge City & C. V. Ry. Co. control, 79 I. C. C. 449; Wabash Ry. Co. lease, 82 I. C. C. 33; Sussex R. Co. control, 82 I. C. C. 33; Sussex R. Co. control, 82 I. C. C. 232; New York, O. & W. Ry. Co. lease, 86 I. C. C. 116; Delaware, S. & S. R. Co. control, 86 I. C. C. 567; Atchison, T. & S. F. Ry. Co. lease, 90 I. C. C. 759; Concho, S. S. & L. V. R. Co. control, 90 I. C. C. 797; Alabama & V. Ry. Co. and Vicksburg, S. & P. Ry. Co. control, 111 I. C. C. 161; Garden City, G. & N. R. Co. control, 111 I. C. C. 430; Pecos River R. Co. control, 124 I. C. C. 204; Gulf, B. & G. N. Ry. Co. control, 124 I. C. C. 220; Texas & G. Ry. Co. control, 131 I. C. C. 747; Naples, S. & G. Ry. Co. control, 131 I. C. C. 787; Detroit Manufacturers R. control, 138 I. C. C. 33; Delaware & H. Co. acquisition, 138 I. C. C. 481; Columbus & X. R. Co. control, 138 I. C. C. 627; Central R. Co. of New Jersey acquisition, 145 I. C. C. 279.

Economy promoted.—Acquisition of control by one carrier of another authorized, when it would result in either operating or accounting economies, or both. (Evansville, I. & T. H. Ry. Co. stock control, 67 I. C. C. 513; Chesapeake & O. Ry. Co. of Indiana lease, 70 I. C. C. 694; and many others too numerous to cite.)

Improvement of service.—Acquisition which will result in better transportation service in the territory served, authorized. (Evansville, I. & T. H. Ry. Co. control, 67 I. C. C. 513; El Paso & S. W. R. Co. control, 70 I. C. C. 795; New York, C. & St. L. R. Co. acquisition and stock issue, 79 I. C. C. 581, and others too numerous to cite.)

Routes, connections, interchange, or switching facilities.—Acquisition of control which would afford shippers the benefit of single-line hauls, authorized. (Oklahoma City S. I. Ry. Co. lease, 90 I. C. C. 374; Cisco & N. E. Ry. Co. control, 117 I. C. C. 447; Indian Creek Valley Ry. Co. control, 117 I. C. C. 625; Jackson & E. Ry. Co. lease, 117 I. C. C. 777; Washington & V. R. Co. control, 124 I. C. C. 307; Beaumont, S. L. & W. Ry. Co. acquisition, 124 I. C. C. 373.)

Financial aid, betterments, and additions.—Acquisition authorized, when it would make available financial aid, needed improvements, and new facilities. (California Southern R. Co. lease, 70 I. C. C. 514; construction of cut-off for Illinois Central R. Co., 82 I. C. C. 100; Gulf, C. & S. F. Ry. Co. acquisition and operation, 82 I. C. C. 527; San Antonio, U. & G. Ry. control, 105 I. C. C. 35; Ann Arbor R. Co. control, 105 I. C. C. 43; Tavares & G. R. Co. control, 105 I. C. C. 383; Construction in eastern Oregon, 111 I. C. C. 3; Bailey Run, S. C. & A. Ry. Co. control, 117 I. C. C. 158; Washington & V. R. Co. control, 124 I. C. C. 307; Cincinnati, I. & W. R. Co. control, 124 I. C. C. 476; Central California Traction Co. control, 131 I. C. C. 125; Muskegon Ry. & Nav. Co. control, 131 I. C. C. 165; Pennsylvania R. Co. acquisition, 145 I. C. C. 283; Texas Short Line Ry. Co. control, 150 I. C. C. 604.

Rate reductions.—Acquisition of control authorized, when it would result in reduction of freight or passenger rates, or both. (Jonesboro, L. C. & E. R. Co. control, 99 I. C. C. 753; New Orleans, T. & M. Ry. Co. control, 105 I. C. C. 79; Holton Interurban Ry. Co. control, 105 I. C. C. 282; San Antonio Southern Ry. Co. control, 117 I. C. C. 311; St. Louis, K. & S. E. R. Co. acquisition, 131 I. C. C. 105.)

Loss of carrier revenue.—When the acquisition of control, or the leasing of one carrier by another would clearly facilitate the movement of traffic through a highly congested district, the circumstance that other carriers would lose revenue is not controlling. (Chicago Junction Case, 71 I. C. C. 631; see Chicago Junction case, 264, U. S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317.)

Effect upon competition.—Congress intended by this section to permit unified operation of common carriers, even if it involved the elimination of competition, when in the public interest. (Valley Germ. Ry. Lease, 65 I. C. C. 105.)

Acquisition of Control which would disrupt long and continued use of a route and channel of trade operating in competition to applicant would not be in the public interest. (International G. N. R. Co. control, 79 I. C. C. 435.)

Traffic increase.—Acquisition of control authorized, control by lease and stock purchase when it would bring about a substantial increase in the tonnage of the acquired carrier. (Chicago, T. H. & S. E. Ry. Co. acquisition, 70 I. C. C. 20.)

Traffic insufficient to support present service.—Acquisition of control of one carrier by another carrier, authorized, on representations that both carriers serve practically the same towns, that the traffic is insufficient to properly sustain one line, and that the completion of a hard-surfaced highway between two important termini will decrease the present inadequate volume of traffic. (Kansas City, C. & S. Ry. Co. control, 94 I. C. C. 5.)

Development of territory.—Acquisition by one carrier of control of another, which would aid in the development of the territory served, authorized. (Saline & S. F. Ry. Co. acquisition, 90 I. C. C. 189; Franklin & A. Ry. Co. control, 90 I. C. C. 815; Black Mountain R. Co. control, 79 I. C. C. 328; Sandy Valley & E. Ry. Co. control, 99 I. C. C. 553; San Antonio, U. & G. Ry. Co. control, 105 I. C. C. 35; New Orleans, T. & M. Ry. Co. control, 105 I. C. C. 79; Dayton-Goose Creek Ry. control, 105 I. C. C. 792; Pond Fork & B. K. R. Co. control, 105 I. C. C. 800; Cumberland & M. R. Co. control, 111 I. C. C. 551; Bayley Run, S. C. & A. Ry. Co. control, 117 I. C. C. 158; Monongahela Ry. Co. acquisition, 117 I. C. C. 329; Cisco & N. E. Ry. Co. control, 117 I. C. C. 447; Washington & V. R. Co. control, 124 I. C. C. 307; Texas & P. Ry. Co. control, 124 I. C. C. 369; Jacksonville, G. & G. Ry. acquisition, 124 I. C. C. 623; Central California Traction Co. control, 131 I. C. C. 125; Atchison, T. & S. F. Ry. Co. acquisition, 138 I. C. C. 787; St. Louis S. W. Ry. Co. construction, 150 I. C. C. 685.)

Avoidance of abandonment—Acquisition of control authorized.—Control by operating contract, of a line which does not parallel or compete with applicant, when separate operation was practically impossible and operation by applicant or its lessee was necessary if the line to be acquired was to remain in the transportation service. (Providence, W. & S. R. Co. contract for operation, 70 I. C. C. 470.)

Extent to which control is concentrated.—Concentration of control may be a necessary incident of the grouping of railroads into a limited number of systems. There is, however, a limit to the extent to which it properly may be carried, and that limit is reached before the concentration has progressed to the extent of 1 to 50; i. e., when effective control is vested in stock ownership the market value of which is less than 2 per cent of the aggregate amount of the book assets of the merged companies. (Southwestern Lines Unification, 124 I. C. C. 401.)

Price to be paid.—It is the commission's duty to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration terms, and conditions thereof are just and reasonable. (Cleveland, C., C. & St. L. Ry. Co. *v.* Jackson, 22 Fed. (2d) 509.)

Manner of financing.—Financial manipulation of great railroad properties as an accompaniment of acquisition or consolidation under the law should not be tolerated. (Erie R. Co. and Pere Marquette Ry. Co. control, 138 I. C. C. 517.)

Credit and financial structure of applicant.—Diminution of a carrier's revenue to a point where its credit is impaired is not in the public interest. (Clinchfield Ry. lease, 90 I. C. C. 113.)

Minority stockholders' rights.—The commission has the power and is required by the statute to consider and protect the interests of stockholders, including minority stockholders. (Cleveland, C., C. & St. L. Ry. Co. *v.* Jackson, 22 Fed. (2d) 509.)

Simplification of corporate structure.—Simplification of corporate structure of railroad systems is in the public interest. (Oregon & C. R. Co. acquisition, 124 I. C. C. 614.)

Permanence of proposed control.—Leave to acquire control denied, when the public benefits had been overestimated and the proposed agreement lacked the element of permanence and stability appropriate for a lasting arrangement. (Buffalo, R. & P. Ry. Co. control, 131, I. C. C. 750.)

Control incidental to reorganization.—Acquisition of control authorized, as incidental to a reorganization program. (International, G. N. reorganization, 72 I. C. C. 722; Missouri-K.-T. reorganization, 76 I. C. C. 84; Denver & R. G. W. reorganization, 82 I. C. C. 745; Denver & S. L. reorganization, 117 I. C. C. 397; Atlanta, B. & A. Ry. Co. reorganization, 117 I. C. C. 439; Georgia & F. Ry. reorganization, 117 I. C. C. 473; Gainesville Midland operation, 131 I. C. C. 352, 455; Gainesville Midland reorganization, 131 I. C. C. 355; Chicago, M. & St. P. Ry. Co. reorganization, 131 I. C. C. 673; Kansas City, M. & O. R. Co. reorganization, 145 I. C. C. 335.)

Recapture of excess income prevented.—Leave for one carrier to acquire control of another, both being controlled by an industry, found not in the public interest, when the income of the line to be acquired may be subject to recapture under the provisions of section 15a (6), this title, and under common control any surplus earnings would be available for use of the carrier seeking the acquisition, which

has operated in the past as a deficit. (Tionesta Valley Ry. Co. lease, 94 I. C. C. 39, 105 I. C. C. 570.)

Acquisition of control after approval.—A carrier, having determined in setting out to acquire control of another, that it is wise to purchase the necessary stock, and that it is willing to pay a certain price per share therefor, if and when authorized by the commission, may in good faith purchase such stock as reasonably as it can without resort to improper means; and the commission has no jurisdiction to determine the compensation which bankers should receive for consummating a transaction for the purchase of such stock, but it is the commission's duty to call attention to any excessive compensation paid. (Gulf Coast Lines control, 94 I. C. C. 191.)

Control of consolidated companies.—The commission may regulate and control the rates and practices of a consolidated company to the same extent as if the constituent companies were operated separately. (Consolidation of Express Companies, 59 I. C. C. 459.)

See I. C. C. Reports, volume 70, June–December, 1921, p. 685 ff., particularly middle of page 687 and top of page 688:

In our opinion it was the intent of Congress that a particular control over the situations should be in our hands, so that the working out of this constructive policy might be safeguarded in every possible way, and so that consolidations or other union of interests might not be affected without our consent.

If it had been intended that these provisions of section 5 should merely offer a means of excaping from the restraints of the antitrust laws and other State or Federal statutes, much simpler machinery would have been devised for accomplishing the purpose. The plan of consolidation is incompatible with such an interpretation of the section and embodies a policy of far greater breadth and vision.

This was by Division IV, composed of Commissioners Myers, Daniels, Eastman, and Potter, Commissioner Potter dissenting.

THE REASONS FOR THIS BILL

At this point may I review the events leading up to the introduction of this bill?

The Interstate Commerce Commission in its annual report for 1929 called your attention to the fact that corporations organized as trading, investment or holding companies appeared also to be active in acquiring control of or substantial interests in railroads. The commission expressed the belief that through the activities of holding companies—

the subjection of the unification of carriers by railroads to the orderly processes of a carefully planned scheme of public regulation, which section 5 was designed to accomplish, is very likely to be partially or even wholly defeated, * * *

You will note that the commission laid emphasis upon "the subjection of the unification of carriers by railroads to the orderly processes of a carefully planned scheme of public regulation, which section 5 was designed to accomplish * * *." A part of this carefully planned scheme of public regulation to be accomplished through the provisions of section 5 is set out in paragraph (2) of that section providing for acquisition of control of one railroad by another.

Just what did the Congress mean to accomplish by paragraph (2)? Was it intended that by paragraph (2) and the other provisions of section 5 merely to afford a means of enabling the carriers by railroad to escape from the restraints of the antitrust laws and other State or Federal statutes? This question was raised in an application by the Pittsburgh & West Virginia Railway for authority under section 20a of the interstate commerce act to issue capital stock and to assume

obligation and liability in respect of certain securities of the West Side Belt Railroad Co.

In passing upon that application the commission said:

We must at the outset * * * in the instant case find, as a prerequisite to the granting of the authority sought by applicant, that the proposed issue or assumption is for some lawful object within its corporate purpose.

Then the commission takes up various paragraphs of section 5, and with reference to paragraph (2) it makes a very careful inquiry as to the purpose of the Congress and proceeded to construe the language of the paragraph in the light of the reports of the committees to the House of Representatives and to the Senate at the time this paragraph was under consideration on the floor of each House. I think you will find, by way of refreshing your memory, that from reading this report, volume 70, page 685, of Finance Reports of the I. C. C., the commission sets out the construction of paragraph (2) and concludes on page 688:

In our opinion it was the intent of Congress that complete control over the situation should be in our hands so that the working out of this constructive policy might be safeguarded in every possible way, and so that consolidations or other unions of interest might not be effected without our consent.

Again, the commission said:

And in like manner, when it is provided in paragraph (2) that we may authorize the acquisition by one carrier of control of another in any manner falling short of consolidation, whenever we are of the opinion that such acquisitions will be in the public interest, this is equivalent to saying that authority for the acquisition shall not exist under other conditions.

Again it said:

When in paragraph (6) it is provided that it shall be lawful to consolidate under certain conditions, this is but another way of saying that consolidations in disregard of those conditions shall be unlawful.

This report was written in December, 1921, nearly two years after paragraph (2) had become the law and was submitted for the commission by Division IV, composed then of Commissioners Meyer, Daniels, Eastman, and Potter. Commissioner Potter dissented. But the other commissioners said:

If it had been intended that these provisions of section 5 should merely afford a means of escaping from the restraints of the antitrust laws and other State or Federal statutes, much simpler machinery would have been devised for accomplishing the purpose. The plan of consolidation is incompatible with such an interpretation of the section and embodies a policy of far greater breadth and vision. (70 I. C. C. 688.)

That was the construction placed upon paragraph (2) in 1921 by the I. C. C. The commission has held from that day to this, that paragraph (2) was intended to give it jurisdiction over acquisitions of control of railroads.

The Pittsburgh & West Virginia requested a rehearing of its application for authority to issue capital stock and assume obligation and liability in connection with purchase by it of property of the West Side Belt Railway Co. It also filed an application under paragraph (2) of section 5 for authority to acquire control by purchase of the West Side Belt Railway Co. These applications were considered by the full commission, and decided on February 6, 1923. (76 I. C. C. 663.) In disposing of the applications, the commission said:

Even if it were possible for us to organize a more complete control than now exists, the application (that is, under paragraph (2)) would have to be denied because approval would not be in the public interest.

Then the commission proceeds to give its reasons for that conclusion. Before reaching this conclusion, the commission said in its report (76 I. C. C. 666):

In our previous report in Finance Docket 1108, it was found that such acquisition of control as is described in this paragraph (paragraph (2)) can not lawfully be accomplished without our approval.

Upon reargument, the counsel for applicant and for interveners contended that this conclusion was unsound and that paragraph (2) of section 5 is permissive rather than mandatory, being in effect an enabling statute to relieve carriers from the operation of State and Federal antitrust laws and other restraining or prohibitory laws. The commission refrained from going into a discussion of this question as being unnecessary, finding that the application was not in the public interest because of the overcapitalization proposed. The Pittsburgh & West Virginia Railway thereupon went to the Supreme Court of the District of Columbia with a bill for an injunction to restrain the Attorney General of the United States and the I. C. C. from proceeding to enforce penalties or forfeitures or otherwise interfering with the issuance of stock and the assumption of certain liabilities by the Pittsburgh & West Virginia Railway Co. The Supreme Court of the District of Columbia dismissed the bill for an injunction, whereupon the carriers appealed to the Court of Appeals of the District of Columbia. On December 3, 1923, this court, speaking through Mr. Associate Justice Van Orsdel, affirmed the decree of the Supreme Court of the District of Columbia. In the opinion in this case, the court said:

We think the power thus conferred on the Congress has a direct relation to commerce, and forms an important factor in the general scheme for the regulation of commerce by the railway systems of the country, as set forth in the transportation act. The power of the commission to regulate rates for the protection of the public and the carrier alike is settled. If this mutual protection is to be fully administered, supervision of the whole matter of the issue of capital stock, investment, and incurring of bonded indebtedness as well as the extension and consolidation of railway lines becomes so directly interrelated with the problem of maintaining a just relation between the public and the carriers that they fall clearly within the constitutional authority of Congress to regulate interstate commerce. * * * If a fair return on capital devoted to the transportation service was to be insured the railway companies, and at the same time proper service and equitable rates accorded the public, the supervision of the issuance of stock, the incurring of bonded indebtedness, the extension and consolidation of railway lines, becomes of the utmost importance. * * * The relation of the carrier to the public which it serves is so inseparable that proper regulation must embrace every instrumentality which has any substantial relation to commerce.

And the court concludes that "this disposes of the contention that appellants have been deprived of their property without due process of law, since the act in question merely restricts the appellants in the use of their property in response to a proper regulation of interstate commerce." (293 Fed. 1001.)

A study of these cases leads to the inevitable conclusion that in the development of the transportation act of 1920, from which paragraph (2) and related paragraphs of section 5 were drawn, great importance was attached by Congress to the ultimate consolidation of the carriers. It was intended that complete control over the situation should be in the commission's hands, so that the working out of a constructive policy might be safeguarded and consolidations or other unions of interest might not be effected without the consent of the commission. The appeal to the Supreme Court from 293 Federal 1001 was dismissed on motion. (See 266 U. S. 640.) Since it was intended that consolidations or other unions of interest provided for in paragraph (2) of section 5 might not be effected without the consent of the commission, we may ask if there have been unions of interest accomplished without the commission's approval.

Mr. Chairman, that completes the general statement that I have prepared and brings me to the particulars of this bill. Commissioner Eastman will explain the bill, and point out how it carries out the recommendations of the full commission, as contained in its annual report to the Congress last December. He will also make clear just what the bill does with reference to consolidations; that is, it combines paragraphs (2) and (6) of the present act, so as to make much easier for the carriers the consolidation which they are authorized in the act to accomplish.

The provisions which are really new are the combination of paragraphs (2) and (6), into paragraph (4) of the bill merely to facilitate combinations. The new paragraph (4) introduces no new element, as I understand it, into the law, unless making it easier to unify be considered a new element.

The new provisions have to do with bringing the railroad holding company, in so far as its activities affecting consolidation are concerned, within the jurisdiction of the commission. That language, at first, looks a little complicated, but when you study it I think you will agree, as we have all agreed, that it is rather simple and goes directly to the object, that is, bringing the holding companies under the jurisdiction of the commission, for what purpose? Merely in so far as their activities affect the consolidations of railroads.

And, when a holding company is authorized to acquire a railroad in the public interest, the bill, as the full commission recommends in its annual report, calls upon such a holding company to make reports as to accounts to the commission under the existing provisions of the act; also requires holding companies to come to the commission when they want to issue securities, if the issuance of the securities will affect the credit and capacity to render service of the carriers owned by the holding company. It also contains the provisions for divestment; that is, to compel a company to divest itself of stock when the company holds a carrier without the consent of the commission and holds it in such a way as to bring it into a system without the approval of the commission.

This paragraph (6) provides for divestment and calls upon the commission, if it does require divestment to provide for a trust agreement for a limited period or other appropriate measure for the purpose of enabling such purchasers, that is, the holding company, to realize at least the fair normal market value of such stocks. That is, this provision undertakes to give the commission authority to compel divesture of stock if it finds the holding of the stock is defeating the realization of its plan by setting up another system not in its plan. The bill itself calls on the commission to do what it would do and what it has done in other proceedings under the Clayton Act, to provide

for trusteeing the stock, not forcing the owners of it to sacrifice it on any market that might exist at the time.

The CHAIRMAN. If the commission administers that law, in your opinion, would that be injurious to investors?

Mr. SPLAWN. Under the Clayton Act, the commission has ordered divestures, and I recall that it provided for trusteeing certain of the stock and it has been very patient and very considerate in the interest of owners of the stock to the end that they may get their money back if they can.

The act as drawn lays emphasis, as Colonel Thom said here this morning, on the plan you wrote into the law merely to the extent of referring to it. The law is that the commission should make a study of the situation as a national proposition and bring out a plan which would act as a guide.

Now, in that statute you have said that the commission may reopen that plan upon its own initiative or upon application; and right now the carriers of the East are before the commission asking it to reconsider its plan with reference to the consolidation in the East. And this bill contains that same provision, calling upon the commission either upon its own motion or upon application to reconsider the plan; and the bill also, provides that if the commission proceeds against some holding company or carrier for an unlawful acquisition and use of stock, and then some one applies for a reopening of the matter of the plan, that the proceeding for divestment shall be held in abeyance until the commission decides whether or not it is in the public interest to modify the plan. If it modifies the plan, then the inference is clear that the proceedings by the commission against the particular company would be abandoned.

There is no criminal provision. There is no effort to put anybody in the penitentiary, as I understand the bill.

The CHAIRMAN. Doctor, I am sure to-morrow morning probably some of the members of the committee will want to ask you some questions, if you can come back.

Mr. SPLAWN. Yes, sir.

The CHAIRMAN. Also, will you speak with Mr. Eastman and tell him to be ready, if you happen to get through before our hour of adjournment.

Mr. SPLAWN. Yes, Mr. Chairman.

(Thereupon, at 11.50 o'clock a. m., the committee adjourned, to meet at 10 o'clock a. m. the following morning, Thursday, February 18, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

THURSDAY, FEBRUARY, 18, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF WALTER M. W. SPLAWN, SPECIAL COUNSEL FOR THE INTERSTATE AND FOREIGN COMMERCE COMMITTEE, UNDER H. R. 114—Resumed

The CHAIRMAN. The Chair desires to make a short statement. Yesterday, while we were in executive session here, and I was explaining to the committee the origin of this bill, I understand there was a lot of talk going on out in the hall among some gentlemen, and somebody asked the question as to where this bill came from.

Now, the chairman of this committee does not have anything to cover up. He does his business in the open, and he would be very glad if other people would do the same thing.

This bill, the first draft of it, and the second draft of it, was written when I was present, when Mr. Parker was present, when Mr. Eastman was present, and Doctor Splawn was present, and when Mr. Perley of the drafting service was present. Where it came from, if anybody wants to know where it came from, that is where it came from. And I stated to this committee yesterday in executive session that this bill we are now considering does not differ in principle or essentials from the original bill, and it does not, no matter what those on the outside may say with reference to it, and I think that Doctor Splawn, in his explanation of the bill this morning, can very well demonstrate that to you.

Doctor Splawn, you may proceed.

Mr. SPLAWN. Mr. Chairman and gentlemen of the committee, yesterday I completed, at the end of the hour, a general statement.

This morning I would like to finish the statement I had prepared, the last part of which comes down to the report of this committee to the House of Representatives, being House Document No. 2789, Seventy-first Congress, third session. There, in Volume II, is set out findings of examinations of accounts and records of certain holding companies.

Beginning with page 820 and following is an account of O. P. and M. J. Van Sweringen holding companies. Opposite page 878 of Volume II are certain charts purporting to show the control of the

Van Sweringen companies on the basis of ownership of voting securities as of April 30, 1930, and other matters.

The chart shows the information as of April 30, 1930, and not as of any subsequent date. It does not mean that the exact set up of all of these holding companies with the exact percentages that were reported on April 30, 1930, would be the same to-day.

The left portion of the first chart shows the railroads of the Van Sweringen system, and how the control was accomplished. It will be noted that the Alleghany Corporation, which was incorporated under the laws of the State of Maryland on January 26, 1929, is the holding company used to tie the different railroad corporations together for purposes of ownership and control. A working control of the Alleghany Corporation is effected through the ownership of 39.75 per cent of this stock by the General Securities Corporation, one-half of the stock of which is owned by the Vaness Co., about 40 per cent which in turn is owned by the Van Sweringen brothers. Below the Alleghany Corporation are found the various railroads, such as the Chesapeake & Ohio, the Erie, the Hocking Valley, the Pere Marquette, the Missouri Pacific, and the Nickel Plate, which make up the so-called Van Sweringen railroad properties. How much of this control of one railroad by another and the unification into a common control through holding companies has been approved by the Interstate Commerce Commission? Certain applications were made to the commission and denied.

Commissioner Eastman was before you in April, 1930. He testified in 1930:

> A newly organized company, the New York, Chicago & St. Louis Railway Co., sought authority to acquire control of the Chesapeake & Ohio, the Hocking Valley, the Erie, the Pere Marquette, and the present New York, Chicago & St. Louis Railroad Co., which is the road known as the Nickel Plate. The authority was refused by the commission in the Nickel Plate unification case, 105 I. C. C. 425, which was decided March 2, 1926. In 1927, the Chesapeake & Ohio sought authority to acquire control of the Erie and the Pere Marquette. Such authority was granted as to the Pere Marquette and denied as to the Erie. Notwithstanding these various denials, it is common knowledge that all of the railroads mentioned are now, and for some time have been, under the common control of the Van Sweringen interests.

This chart shows how that control was effected, as of April 30, 1930. This common control has been accomplished in a considerable measure, through a series of holding companies. These holding companies are all set out here and the percentages of stock owned and so forth is shown.

Despite these denials by the Interstate Commerce Commission, we find these properties effectively tied into a system through the use of holding companies, and to all appearances the unification is as complete as if it had been approved by the commission. In this same system it will be seen that the Missouri Pacific Railroad Co. is 50.50 per cent controlled by ownership of the Alleghany Corporation. In the commission's plan of consolidation the Missouri Pacific system is assigned to system No. 18, which consists of the Western Pacific Railroad, the Denver & Rio Grande Western Railroad, the Denver & Salt Lake Railroad, and various short and other lines of railroad. Here is an instance of a dominant railway property of a system west of the Mississippi River, and which in the commission's plan of consolidation was to be independent of all other systems, being brought under the same control, through stock ownership, as a system No. 6

east of the Mississippi River, which also was intended by the commission to be distinctly independent from other systems.

The extent to which the Van Sweringen system has been tied together with the aid of pyramiding is indicated by the other charts opposite page 878 of Volume II.

PENNSYLVANIA UNIFICATIONS

Now, let us turn to the Pennsylvania unifications. Beginning with page 632 and following are the findings of examination of accounts and records of the Pennroad Corporation and the Pennsylvania Co., railroad holding companies.

The Pennroad Corporation may be defined as an affiliate of the Pennsylvania Railroad Co. whereas the Pennsylvania Co. is a holding company owned by the Pennsylvania Railroad Co. Opposite page 714 of Volume II is a chart which indicates how the Pennsylvania Railroad Co. has made use of its holding company, the Pennsylvania Co., and its affiliated holding company, the Pennroad Corporation. Without the approval of the commission, the Pennsylvania Railroad Co. appears to have acquired control of the Lehigh Valley Railroad Co. in the following manner—you have the chart before you: The Pennsylvania Railroad Co. owns 100 per cent of the stock of the Pennsylvania Co. The Pennsylvania Co. owns 49 per cent of the stock of the Wabash Railway Co. The Wabash Railway Co. holds 19.08 per cent of the control of the Lehigh Valley Railroad Co. Again, the Pennsylvania Co. holds 30.17 per cent of the voting stock of the Lehigh Valley Railroad Co. These holdings added together give the Pennsylvania Co. (a subsidiary of the Pennsylvania Railroad Co.) directly and indirectly through the Wabash, 49.25 per cent of the voting stock of the Lehigh Valley Railroad Co. The Pennroad Corporation, an affiliate, has 0.82 per cent of the voting stock of the Lehigh. This 0.82 per cent added to the 49.25 gives a total of 50.07 per cent, or a bare majority of the control of the Lehigh Valley. That is, through these transactions the Pennsylvania Railroad Co., by a bare majority, appears to have control of the Lehigh Valley, though the Pennsylvania Railroad Co. itself may not own one share of stock of the Lehigh.

The Pennsylvania Railroad system is assigned in the commission's "plan of consolidation" to system No. 4. In fact, the Pennsylvania system just about constitutes system No. 4. The Lehigh Valley is assigned to system No. 7. The Wabash, through which control of the Lehigh was effected, and a working control of which has been acquired by the Pennsylvania Co., is also assigned to system No. 7. The Detroit, Toledo & Ironton was assigned to system No. 5, the Baltimore & Ohio, and to system No. 7, each of which were given an undivided one-half in the Detroit, Toledo & Ironton, for the purpose of the plan. Without the approval of the commission, the Pennroad Corporation, an affiliate of the Pennsylvania Railroad Co., has acquired the Detroit, Toledo & Ironton to the extent of 99 per cent through title to its stock. The New York, New Haven & Hartford Railroad Co. is assigned to system No. 2 in the commission's "plan of consolidation." This chart opposite page 714 of Volume II of the report shows that the Pennsylvania Railroad Co. is buying directly

into the New Haven, and that the Pennroad Corporation is also purchasing New Haven stock. These acquisitions at the time of this investigation while material were far from a majority of the stock. Reports in the financial journals indicate that these companies have continued to make acquisitions of New Haven stock, and that now the holdings of the Pennsylvania Railroad Co. and its affiliate in the New Haven are very substantial. The Boston & Maine Railroad is assigned to system No. 1 in the commission's "plan of consolidation." This chart, opposite page 714, portrays the activity of the Pennsylvania through its affiliate, the Pennroad Corporation, in buying into the stock of the Boston & Maine. Pennsylvania holdings in the Boston & Maine are said to be very important. The Seaboard Air Line Railway Co. was assigned to system No. 7. It is seen that the Pennsylvania Railroad Co., through its affiliate, the Pennroad Corporation, has become heavily interested in the Seaboard. The Pittsburgh & West Virginia is assigned in the commission's "plan of consolidation" to system No. 7.

The Pennsylvania Railroad Co., through its affiliate, the Pennroad Corporation, has acquired 73 per cent control of the Pittsburgh & West Virginia. That is, the Pennsylvania Railroad Co. has set up an affiliate, the Pennroad Corporation, which it apparently is using as a fighting corporation. Through it it has made sufficient acquisitions of carriers assigned to the commission's system No. 7 to enable it, if it so desires, to block the realization of that system. It has acquired enough control over the Detroit, Toledo & Ironton, that is, complete control, to veto the commission's disposition of that property in its final "consolidation plan" as between its systems Nos. 5 and 7. It is acquiring stocks of New England railroad properties so aggressively that, if unchecked, it is reasonable to believe it will soon be in a position to forestall any disposition of those properties in harmony with what the commission may adjudge to be in the interest of New England and of the country at large, if the commission should decide in favor of some allocation of the railroads of New England, other than to the Pennsylvania.

The commission has been called upon to be very technical and extremely literal in construing paragraph (2) of section 5. In the case of the directors of the Wheeling & Lake Erie Railroad, 138 I. C. C. 643, the commission said:

> Although this paragraph provides for the acquisition of control of one carrier by another and is silent regarding the acquisition of control by two or more other carriers, it is reasonable to assume that Congress had no intention of thus restricting its application. The statute can not be evaded by the cooperation of two or more carriers in an acquisition of control.

In the securities application of Pittsburgh & West Virginia Railroad, 70 I. C. C. 687, to which I called your attention yesterday, the commission said:

> The preparation and adoption of a "plan of consolidation" under such instructions from Congress requires deliberate and careful consideration of every railway property of the continental United States from competitive, financial, commercial, and other points of view so that each such property may, with nicety, be fitted into its appropriate place in the final scheme. Obviously, also, many consolidations which are not barred by restraining provisions of the "anti-trust laws" or other Federal or State statutes may be wholly inconsistent with the plan and destructive of its purpose. Yet, if consolidations of this kind can now be lawfully effected without our approval, the conclusion is inevitable that the carriers may ignore section 5 with impunity under similar circumstances after the plan has finally been adopted, and thus bring quick disaster to its entire structure.

It was intended that the commission should have complete control over the situation so that the working out of a constructive policy might be safeguarded and unions of interest might not be effected without the approval of the commission. Through the use of the holding company that intent has been thwarted.

In discussing the paragraphs under section 5 in the securities application of the Pittsburgh & West Virginia Railroad Co., 70 I. C. C. 687, the commission said:

> Yet, if consolidations of this kind can now be lawfully effected without our approval, the conclusion is inevitable that the carriers may ignore section 5 with impunity under similar circumstances after the plan has finally been adopted, and thus bring quick disaster to its entire structure. It is impossible to believe that it was the intent of Congress to prescribe with such care the method by which this elaborate and comprehensive program shall be formulated, and the principles by which it shall be governed, and at the same time leave open a door by which at any time it may be wrecked. And the same may be said of the intent of paragraph (2), for if carriers are permitted to gain control of one another without our approval by means of falling short of consolidation, and in a manner which is out of harmony with the ultimate "plan of consolidation" to that extent, the difficulties in the way of the consummation of the plan will be increased and the probability will be diminished that it may ultimately be accomplished through voluntary action of the carriers.

The representatives of these holding companies will no doubt contend that the systems which they have accomplished and are seeking to achieve are better systems than those proposed by the commission in its plan, and that they are more in the public interest than are the proposals of the commission.

This bill, which you have before you, would leave them to argue such questions before the commission, as they are doing at the present in an application by the eastern carriers to modify the plan as it affects the East.

Mr. HUDDLESTON. You mean by that, that the commission has power to vary its plan at any time if they should be convinced that the carriers' proposals for consolidation were better than their own?

Mr. SPLAWN. That is the present law, and that feature of the present law is retained in the bill before you.

This bill would deprive these companies of the power, these holding companies, of the power arbitrarily to veto the judgment of the commission. It is obvious that through the use of the holding company some great railroads are now in a position to veto and have it in their power to bring to naught the conclusions of the commission. It may be assumed that such systems will exercise the veto in their own interest and in the interest of the stockholders of the companies as those interests are conceived by the company managements, and without due regard to whether or not company interests are in conflict with the larger purposes set forth by Congress.

It may be said for the managements of these companies that they are perfectly sincere in their belief that what they have done is wiser and better for themselves and for the country than the proposals of the commission. But, under the law, the commission, when it published its final "plan of consolidation" had not put forth a decree which, like the law of the Medes and Persians, is not subject to change. The statute is very clear. To quote the present law: "The commission at any time thereafter;" that is, after it has published its final plan, "upon its own motion or upon application reopen, the subject for such changes or modifications as in its judgment will promote

the public interest." That feature is retained in the bill. There is now pending before the Interstate Commerce Commission an application of eastern carriers for a revision of the commission's plan. This application reads:

Consolidation of railroads. In the matter of the consolidation of the railway properties of the United States into a limited number of systems. Application of the Baltimore & Ohio Railroad Co., the Chesapeake & Ohio Railway Co., the New York Central Railroad Co., and the Pennsylvania Railroad Co.

Application to do what?

To reopen the subject and to change and modify in certain respects the plan adopted and published herein under date of December 9, 1929, for consolidation of railway properties of the continental United States into a limited number of systems.

The investigation which this committee conducted under House Resolution 114 has established that the commission was correct in its belief that certain railway systems are in desperate competition for strategic properties, particularly in eastern territory. They have been getting ready for this consolidation and each one has been struggling for advantages. The acquisitions of such holding companies, as the Pennroad Corporation and Alleghany Company, are notable instances.

The commission came to you two or three years ago, outlined the situation, and made the complaint, with the statement of facts, which they believed to be true, and which your investigation verified to be true, that consolidation can be set up through the use of holding companies apart from paragraph (2), or paragraph (6), of section 5.

Conceivably, some interest might hold a strategic railroad indefinitely and seek to set up a system to its own liking and thereby greatly retard the process of desired and orderly consolidation. Such an interest might plead in justification of its activity that consolidation should be gradual. While there is a large body of public opinion in this country favoring the gradual consolidation of railroads, there is not so much opinion in favor of outright obstruction to consolidation. Obviously, there is a difference between gradual and orderly consolidation and obstinate obstruction. Gradual consolidation contemplates applications to the Interstate Commerce Commission, careful consideration of well-prepared records, and adjustments and modifications of systems in the light of experience. The mere holding of important railway property in order to attain some private profit is not the same thing as a gradual consolidation, but is rather an arbitrary interference with any sort of consolidation and involves a refusal to permit an inquiry as to whether the particular acquisition is or is not in the public interest. Regardless of the intent or motive which might be alleged, the commission was correct in its fear that the effect of these acquisitions of control by nonoperating companies not within its jurisdiction would be so to entrench particular interests in so far as particular properties are concerned that consolidation might perhaps in effect be accomplished without the approval of the Congress. Certainly the difficulties would be so increased as to make it well nigh impossible to bring about the agreement necessary to an orderly and satisfactory unification of railway properties in eastern territory. What has been done in the East could easily be duplicated when there might be provocation in any other part of the country.

The holding company has lent itself as a convenient instrumentality in this terrific struggle between the railway giants of the East over coveted properties. An amendment to paragraphs (2) to (8) of section 5 has been drawn so as to bring these holding companies under the jurisdiction of the commission in so far as they seek acquisition of control of railroads. (H. Doc. No. 2789, p. LXXXVI.

Turning to the bill, the bill reads:

To amend section 5 of the interstate commerce act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the interstate commerce act, as amended (U. S. C., title 49, sec. 5), is amended by striking out paragraphs (2) and (3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively.

Paragraph 2 reads as follows:

(2) Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises.

And, section 3, which is also stricken, is a short section having to do merely with supplemental orders, and reads:

(3) The commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

As will be shown later, the substance of these two paragraphs is retained later in the bill. By renumbering paragraphs (4) and (5) they would become paragraphs (2) and (3). If this bill should become the law, paragraph (1) of section 5 would be wholly unchanged. That is a paragraph that has to do with pooling; giving the commission power to authorize pooling and division of rates. Paragraph (4) would become paragraph (2), and paragraph (5) would become paragraph (3).

Paragraphs (4) and (5) of the present law are the paragraphs which contain the substantive law concerning consolidation.

Paragraph (4) of the present law would become paragraph (2). It is not changed in any particular, and reads as follows:

(4) The commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

That is the way that paragraph of the present law reads. It has been the law ever since 1920, and there is no proposal to change it but merely to renumber it as paragraph (2).

It does not say that the earnings of each new system shall be the same as those of its competitor, but shall be the same so far as practicable.

Then, paragraph (5) of the present law which under the bill would become paragraph (3) reads:

(5) When the commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the governor of each State, shall hear all persons who may file or present objections thereto. The commission is authorized to prescribe a procedure for such hearings and to

fix a time for bringing them to a close. After the hearings are at an end, the commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

That is the plan now published. There is no proposal in this bill to change one word in those two paragraphs.

Section 2 of the bill reads:

SEC. 2. Such section is further amended by striking out paragraphs (6), (7), and (8) and by inserting in lieu thereof the following paragraphs:

I will now read the present paragraph (6) of section 5.

It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

And then, the conditions are laid down as follows:

(*a*) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the commission.

That paragraph (5) is one which would become paragraph (3) in this bill. That language is retained, as you will see, in the bill.

In the bill, (*b*) is omitted. It reads:

(*b*) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the commission. The value of the properties sought to be consolidated shall be ascertained by the commission under section 19a of this act and it shall be the duty of the commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

You have already considered in connection with 15a the advisability of repealing this particular subparagraph of the present law.

Subparagraph (*c*) of the present paragraph (6) reads:

(*c*) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon, such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

As I will show in a moment, paragraphs (2) and (6) have been combined in paragraph (4) of the bill, with some changes.

Paragraph (7), which is omitted, reads as follows:

(7) The power and authority of the commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the commission within thirty days after the passage of this amendatory act; and pending the decision of the commission such consolidation shall not be dissolved.

Under this paragraph, the consolidation of express companies has been consummated so it is no longer needed in the law.

Paragraph (8), which it is proposed to delete, substituting practically the same language in the bill, however, reads:

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such orders shall be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the act entitled "An act to supplement existing laws against unlawful restrains and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

As I have indicated, the bill in the first new paragraph, paragraph (4), undertakes to combine subparagraphs (2) and (6) of section 5 and change the wording a little so as to authorize consolidations in other ways than those provided in existing law.

(4) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership—

That is, if this bill were law, two or more railroads, on the proper showing, could get authority to consolidate or merge their properties or any part of their properties into one corporation.

or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock—

That is provided in paragraph (2) of the present law.

Now, here is something that is not in paragraph (2):

or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

That is in the bill and is not in the present law.

Now, what are the conditions under which the carriers may come; that is, consolidate, merge, or enter into contracts for the leasing of properties, acquire control through stock ownership, combine themselves in various ways?

They are as follows:

(A) The proposed consolidation, merger, purchase, lease, operating contract, or aquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3)—

Which is now paragraph (5) of the law—

and shall be approved by the commission.

That is to say, the conditions would be practically the same as at present. It is practically the same language that you have now, in your subparagraph (*a*) of paragraph (6). Then:

(B) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this paragraph, the carrier or carriers or corporation seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify the governor of each State

in which any part of the properties of the carriers involved in the proposed transaction is situated—

You will notice that this is substantially the same language as in subparagraph (c) of paragraph (6) of section 5.

and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the commission finds that the public interest will be promoted by the transaction—

Now, the present law says "by the consolidation" instead of "by the transaction," because that is all that is provided for in subparagraph (c), paragraph (6); whereas here you have provided for combinations not only by consolidation but by acquisition of control by contract, and so forth, so that the word "consolidation" is changed to "transaction."

proposed and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe.

Mr. HUDDLESTON. May I interrupt you?

Mr. SPLAWN. Yes, sir.

Mr. HUDDLESTON. There is something that you passed over: These various provisions for consolidation, and control, and so forth, do not specifically include voting trust, or pools.

Are they intended to be legalized, or what effect does this bill have on such?

Mr. SPLAWN. This is limited to corporations. The law which Congress enacted in 1920 provided for consolidations, which shall be of a permanent character, and none of these devices such as community of interest and temporary arrangements were contemplated as a means of effecting permanent consolidation.

So, this limits the lawful consolidation to acquisition of control and merger, and so on, of corporations. That is, getting a majority of the stock for the purpose of holding it for control, and not for the purpose of holding it as a trustee for the stockholders, without any idea of acquisition of control.

Devices which might interefere with the plan are outlawed in a later section.

Mr. HUDDLESTON. They are outlawed?

Mr. SPLAWN. They are outlawed in a later section.

Mr. HUDDLESTON. Then, if this bill should become a law, control, temporary or otherwise, through pools, voting trusts, or other combinations would not be possible?

Mr. SPLAWN. Well, they would be possible.

Mr. HUDDLESTON. I mean, not legal.

Mr. SPLAWN. They would not be lawful, as far as your program of consolidation is concerned, unless they came within this paragraph (4) of the bill.

Commissioner Eastman has just reminded me that pooling of traffic and earnings is already permitted and authorized under paragraph (1) of the section.

Mr. HUDDLESTON. I refer more particularly to stock pools voting trusts and other combinations for control of stock.

Mr. SPLAWN. Those things, I think you will find, are taken care of a little later in this bill.

Mr. HUDDLESTON. May I inquire whether they will be legal or illegal after this bill is passed?

Mr. SPLAWN. A trusteeing of stock for the purpose, as I read this bill, of consolidation under paragraph (4) of the bill would not be disturbed, but a trusteeing of stock for the purpose of interfering with consolidation provided in paragraph (4), the Commission could bring up.

Does that answer the question?

Mr. HUDDLESTON. Yes, that answers the question.

Mr. SPLAWN. The next is (C):

(C) Whenever a corporation which is not a carrier is authorized, by an order entered under subparagraph (B) of this paragraph, to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the commission in the administration of the paragraphs specified.

That is, a holding company which has been authorized to acquire control of carriers is treated as a carrier, for what purpose? In matters relating to the issue of securities and assumption of liabilities of carriers, and relating to reports and accounts.

Mr. GARBER. May I ask you a question?

Mr. SPLAWN. Yes, sir.

Mr. GARBER. Why should holding companies be permitted to obtain control of a carrier?

Mr. SPLAWN. You are asking why they should be permitted at all?

Mr. GARBER. Yes.

Mr. SPLAWN. Why let them come in control of a carrier? And, why take them in as a device which is legalized for the purpose of controlling stock?

Mr. GARBER. Yes.

Mr. SPLAWN. Why include them in paragraph (4)?

Mr. GARBER. Yes.

Mr. SPLAWN. The holding company is a very convenient device for getting control. There are some States, like my own State (Texas), which have very strict laws requiring the railroads to be State corporations and to maintain general offices within the State. Such situations are handled now not always by pure holding companies but by the parent holding company, an operating company but a holding company for the purpose of owning the subsidiaries, so that they may comply with the State law. I think that since the holding company has come to be so widely used in this country, that you might permit its utilization under the supervision of the commission in working out these consolidations. It would certainly be about the most expeditious way of setting up some consolidations.

Mr. GARBER. You think it is essential then for the purpose of facilitating consolidations?

Mr. SPLAWN. I think that it will greatly facilitate consolidation if you enact this provision of the bill.

Mr. GARBER. If the slate was clean and we were doing it over again, perhaps you would withhold that authority?

Mr. SPLAWN. Well, it is hard to say what would be done if our experience had been different.

I tried to say yesterday what we have done in this country, so that you would have a background of this development in the railway field.

There are many people who sincerely regret that we ever embarked upon the policy of authorizing by law, a corporation to go and buy the stocks of another corporation.

Now, assuming that you had enacted into law this paragraph (4) this authorization of combinations by use of the holding company, and the commission would find it in the public interest, this subparagraph (C) merely treats such a holding company as though it were a railroad, for two purposes, as set out in subparagraph (C).

Now, paragraph (5) (a) of the bill, reads:

It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated in violation of this paragraph. As used in this paragraph, the words, "control or management" shall be construed to include the power to exercise control or management.

Paragraph (4) of the bill combines paragraphs (2) and (6) of the act. The procedural paragraphs of your consolidation law are here combined in such a way as to facilitate consolidations, and declares what shall be lawful legalizing some forms of combinations which heretofore have not been specifically legalized.

Paragraph (5) (a) of the bill declares other groups and ways of grouping to be unlawful and is rather specific as to what may be an unlawful unification.

Now, as to subdivision (b) which provides—

For the purposes of subdivision (a), but not in anywise limiting the application thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

Which has the effects set out in (A), (B), and (C) of such subdivision, on page 5 of the bill. It will be noted that under subdivision (a) the thing which is made unlawful is "accomplishing or effectuating the control or management in a common interest of any two or more carriers." There are instances intended to be covered by subdivision (a) in which it might be difficult to show as a matter of law that control or management in a common interest had been accomplished or effectuated, and it is the purpose of subdivision (b) to establish as a rule of law that certain transactions which it might be argued do not come within the provisions of subdivision (a) are to be considered as accomplishing or effectuating control or management in violation of subdivision (a). Therefore, subdivision (b) (A) provides:

(A) If such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

Then, that shall be considered as accomplishing or effectuating control or management in a common interest.

As an illustration, if holding company X (being affiliated with railroad A) holds part of the stock of railroad B, and railroad A purchases enough of the stock of railroad B so that the holdings of X and A, when added together, amount to more than a majority of the stock of railroad B, then the purchase by railroad A would be a transaction deemed to accomplish or effectuate control or management in a common interest of two carriers, even though the amount of stock purchased by railroad A may have been small. The effect would be the same in a case in which, instead of merely A and X being involved, stock was held by other persons affiliated with A. The determining factor is whether, after A's transaction, the interests of A and all persons affiliated with A, when added together, give control of railroad B.

Now, (B) under subdivision (b) reads:

(B) If such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

It will be observed that this provision corresponds to (A), explained above, with the exception that it is directed at transactions by affiliated holding companies and persons, rather than at transactions by the railroads themselves as in (A). Perhaps the application of this provision, in one instance, may be best illustrated by the following hypothetical case based upon actual facts:

Taking the chart, opposite page 714 in part 2 of House Report 2789, Seventy-first Congress, and looking down under the list of Pennroad holdings, there are the Pittsburgh & West Virginia Railroad Co., and the Detroit & Ironton Railroad Co. If this bill had been the law, and the Pennroad Corporation, on its own, had gone out and acquired one or both these properties, and if it had been found that the Pennroad Corporation was an affiliate of the Pennsylvania Co., as defined in this bill, that would have been deemed to be, under this bill, an unlawful acquisition of control. It would be considered that if the Pennroad had acquired the Detroit, Toledo & Ironton Railroad Co. (and the Pennroad was an affiliate of the Pennsylvania), by that action of the Pennroad, the Detroit, Toledo & Ironton had been brought under the same control or common interest as the Pennsylvania Railroad.

Mr. GARBER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Garber.

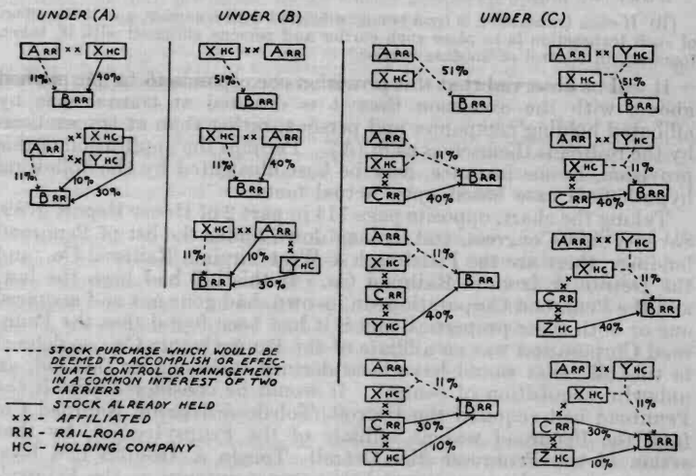
Mr. GARBER. May I inquire as to the legal significance of the words "affiliated with a carrier"?

Mr. SPLAWN. In subdivision (c), Judge Garber, beginning with line 21 of page 5, the bill reads: "For the purposes of subdivision (b) a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier" and then skipping the parenthesis to line 4 of page 6, "it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

This is an effort to define an affiliated person. Let us take the Pennroad Corporation—I am not using them here in any derogatory sense—I am just using this as an illustration to clarify the bill. They might deny that they were an affiliate, as defined here, of the Pennsylvania Railroad Co., and might be able to prove their contention.

Merely for the purpose of clarifying this subdivision (c), without alleging here anything derogatory to that company, it might be said that, for the purposes of subdivision (b), the Pennroad Corporation would be held to be affiliated with the Pennsylvania Railroad Co. if by reason of the relationship of the Pennroad Corporation to the Pennsylvania Railroad Co. it is reasonable to believe that the affairs of any carrier (for example, the Pittsburgh & West Virginia) of which control may be acquired by the Pennroad Corporation will be managed in the interest of the Pennsylvania Railroad. Of course, that would be subject to proof, but if that were proven to the satisfaction of the commission and the courts, then you yould have a transaction

ILLUSTRATIONS OF TYPICAL TRANSACTIONS WHICH WOULD BE COVERED BY PROPOSED PAR. (5) (b) (A), (B) AND (C), UNDER H. R. 9059



which, under subparagraph (b) of (5) would be an unlawful transaction within the meaning of this bill.

Next, we come to (C) of subdivision (b), which reads as follows:

(C) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

This provision, to state the matter generally, is intended to cover the same cases as are covered by (A) and (B) except that, whereas those provisions cover cases where one railroad or one holding company enters into a transaction, this provision is intended to cover the cases where the transaction is entered into by two or more persons acting jointly, one of such persons being a railroad or a person affiliated with a railroad. Owing to the number of parties who may be involved, both in the transaction and in the various affiliations of those concerned, the accompanying set of diagrams will probably illustrate

the application of this provision more clearly than specific cases which I might set forth here.

In explanation of the attached diagrams, I will say that they are intended to illustrate typical transactions which are proposed to be covered by (A), (B), and (C) of subdivision (b) of paragraph (5), the provisions heretofore discussed. The diagrams do not purport to show all the cases, and there are many variations not shown which it is believed the language of the provisions cover. In the diagrams, where holding companies are indicated, it will be noted from the language of the bill that the activities of corporations or individuals, as well as holding companies, would be covered in such instances. Also, while the diagrams are in terms of holding and acquiring stock control, the language of the bill is comprehensive enough to cover other types of interest. The proposed transactions which the diagrams are intended to illustrate as being unlawful, unless approved by the commission, are indicated by dotted lines.

Subparagraphs (d) and (e) of paragraph (5) read:

(d) The commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of subdivision (a). If the commission finds after such investigation that such person is violating the provisions of such subdivisions, it shall by order require such person to take such action as may be necessary, in the opinion of the commission, to prevent further violation of such provisions.

(e) For the purposes of this paragraph, wherever reference is made to control is is immaterial whether such control is direct or indirect.

Paragraph (6) reads:

(6) For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith, the commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether the holding by any person of any part of the stock or other share capital of any carrier (unless acquired before February 28, 1920, or unless acquired with the approval of the commission) is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier.

Now, I may explain that this divestment provision is put in here to meet the recommendation of the full commission as contained in their annual report, as were the provisions of (C) of paragraph (4), with reference to accounts and the issuing of securities. Those two provisions in response to the recommendation of the Interstate Commerce Commission are added to the Parker bill which was introduced a year ago.

The original Rayburn bill, H. R. 5324, which was introduced in this session, contained these provisions, and it referred to the plan and to harmony with the plan just about as this bill makes the reference.

The difference between the second Rayburn bill and the first, the material difference, is that in paragraph (4) you combine——

Mr. CROSSER. What page?

Mr. SPLAWN. Paragraph (4), page 2, you would combine the existing paragraphs (2) and (6), the procedural paragraphs of the consolidation law. The substantive law, paragraph (4) and paragraph (5), you renumber without change as (2) and (3). In this paragraph

(4) which is brought into the second Rayburn bill, you facilitate unifications under the plan.

The CHAIRMAN. But there is no fundamental change in it or difference between the two?

Mr. SPLAWN. Not the law of consolidation, for that is contained in paragraphs (4) and (5) which you propose merely to renumber as (2) and (3).

The CHAIRMAN. That is what I say.

Mr. SPLAWN. If the eastern carriers are successful in their application to the commission to modify the plan as it refers to the East—that plan, as referring to the East, calls for five systems, exclusive of New England; they are asking for four systems—now if they are successful in that application, then, under this bill it would be much easier for them to unify than it would be under the existing law.

Now, this divestment provision, I think, is clear. If there are any questions I shall be pleased to try to answer them. The commission is limited in any order it may make very strictly. First, it can not go out and compel a company to divest itself of stock unless it is convinced that the company is using that stock in such a way as, in whole or in part, to prevent or hinder the carrying out of any part of the plan or in interfering with the independence of the systems provided for in the plan, by subjecting two carriers to common control.

Mr. HUDDLESTON. May I ask the significance of the date February 28, 1920?

Mr. SPLAWN. The commission under this bill may not order any company to divest itself of railroad stock which it acquired before you wrote the consolidation provisions into the act to regulate commerce.

Mr. HUDDLESTON. Just why should there be that limitation?

Mr. SPLAWN. The purpose of that limitation is this: It is to be assumed any stocks acquired for the purpose prohibited in the bill were acquired since the consolidation was provided for.

Mr. HUDDLESTON. Do I understand that the theory of the use of that date is that the consolidations or acquisitions of control since that date have been in evasion of the act of 1920?

Mr. SPLAWN. Yes; may have been.

Mr. HUDDLESTON. Now, prior——

Mr. SPLAWN. It is to reach any case that may arise.

Mr. HUDDLESTON. Prior to that date no consolidations were permitted.

Mr. SPLAWN. Not provided for in the act.

Mr. HUDDLESTON. So that any acquisition of control prior to that date would be in evasion of the then law, would it not?

Mr. SPLAWN. Well, there was no law, except in so far as the antitrust laws were concerned.

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. There was no prohibition to the acquisitions.

Mr. HUDDLESTON. The act of 1920 was an enabling act?

Mr. SPLAWN. Yes; and encouraging the consolidation into a limited number of systems.

Mr. HUDDLESTON. I have always dissented from the idea that it was the province of Congress "to encourage" those things.

Mr. SPLAWN. Well, at least it permitted it where under certain conditions it could not have been lawfully accomplished.

Mr. HUDDLESTON. Now, prior to that time there was no law permitting these consolidations?

Mr. SPLAWN. No; there was no consolidation provision in the act.

Mr. HUDDLESTON. So that any consolidation was an evasion of the then law. I am unable to understand why you fix that period and stop there. Let us assume that the control gained before that date is against the public interest. Why allow it to stand?

Mr. SPLAWN. You had under the antitrust laws in 1904 a decree of the court ordering a holding company to divest itself of railroad stock.

Mr. HUDDLESTON. Now, we have lifted that.

Mr. SPLAWN. That is the Northern Securities case. But, this complaint that has come to you from the commission was a complaint growing out of activities in connection with consolidation. Consolidations have been provided for and were provided for in 1920, and what is undertaken here is to amend that section so that the retroactive features of this subparagraph is limited to the date of the transportation act of 1920.

Mr. HUDDLESTON. Have you examined the decisions with reference to whether control in these various forms was violative of the antitrust laws?

Mr. SPLAWN. Was a violation of the antitrust laws?

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. Well, there are some control cases like the acquisition of the Missouri-Pacific by a holding company which also controlled a system east of the Mississippi River which would appear to be very difficult to bring within the scope of the antitrust laws.

Mr. HUDDLESTON. Specifically, would acquisition of control of two competing railroads by a single individual, be a violation of the antitrust law?

Mr. SPLAWN. The Clayton Act outlaws a corporation——

Mr. HUDDLESTON. I mean——

Mr. SPLAWN. You mean back to that—the Sherman Act?

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. Well, if an individual violated the antitrust law, he has violated it. [Laughter.]

Mr. HUDDLESTON. That is pretty obvious, I should say. I am wondering if the Supreme Court has passed on the point or not.

Mr. SPLAWN. So far as that is concerned, there is not so much danger from a situation of that kind, for the reason that the life of an individual is very short. Mr. Harriman once said to a Senate committee that he would like to buy a great group of railroads, because he recognized them as good properties, if he could buy them; but Mr. Harriman, within a very few years, passed out of the picture.

Mr. HUDDLESTON. Of course, there are a great many instances in which railroads through one means and another have acquired control of competing lines and that has been going on for many years.

I wonder if that is violative of the Sherman Act. I want to know if the Supreme Court has decided that that is violative of the antitrust act.

Mr. SPLAWN. There is a section on page 47 of the report on limitation of the right of individuals to acquire stock in interstate railroads, and the conclusion there is: It is true that most of the decrees did not go to the point of prohibiting future acquisitions of stock in competing companies, but that is not now the issue before us. They did in each

instance strike a blow at individual ownership of shares in two normally competing companies. If the policy of an act warrants the interference with stock ownership at all, there is ground in these decrees and decisions for believing that it may put restraints on individuals in that regard whatever was the judicial view when the Pearsall case which is discussed above was decided.

Now further, in answer to your question——

Mr. BULWINKLE. Mr. Chairman, I would like to ask one question.

The CHAIRMAN. Just a moment. Let him finish with that.

Go ahead, Doctor.

Mr. SPLAWN. If I may reiterate what I have tried to say in response to your questions, this limitation in the bill is proposed to be placed on the commission because the bill, a little later on, preserves whatever law there may be with reference to restraining competition; and the commission is restrained from going back of February 28, 1920, because this has to do with interference with consolidation, and you did not have a consolidation provision before 1920.

The CHAIRMAN. In other words, there was no law to evade before February 28, 1920, so far as this act is concerned.

Mr. BULWINKLE. Mr. Chairman, I understand——

The CHAIRMAN (continuing). I am talking about the consolidation provisions as contained in the interstate commerce act.

Mr. BULWINKLE. Doctor, I understood you to say this, in discussing this paragraph or section, in answer to Mr. Huddleston's questions that the procuring of the holdings of a railroad company as spoken of there are illegal.

Mr. SPLAWN. Holdings of a railroad?

Mr. BULWINKLE. Stocks of any railroad company in the holding corporation?

Mr. SPLAWN. Holding by any persons, railroad company, might be.

Mr. BULWINKLE. I am not talking about what might be, I am talking about have they been acquired illegally?

Mr. SPLAWN. This does not assume an illegal purchase.

Mr. BULWINKLE. Then nothing more has passed?

Mr. SPLAWN. This does not assume anything illegal in the acquisition.

Mr. BULWINKLE. I am talking about the holdings or acquisitions of these stocks in a holding company.

Mr. SPLAWN. Yes.

Mr. BULWINKLE. Because I want to clear that up in my own mind.

Mr. SPLAWN. The commission would be authorized in this bill upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether or not the holding by any person of any part of the stock or other share, capital share, is or is likely to become the cause, in whole or in part, of preventing or hindering the carrying out of any part of the plan in certain respects by subjecting two or more railroads to a common ownership.

Mr. BULWINKLE. When did the Interstate Commerce Commission finally adopt its plan for consolidation?

Mr. SPLAWN. In December, 1929.

Mr. BULWINKLE. That is all, Mr. Chairman.

Mr. HOCH. Just on that point, raised by Mr. Huddleston, with reference to the significance of the date, February 28, 1920. It seems

to me that the statement Mr. Huddleston made as I understand it, might not be entirely clear on the record. As I understand, he says consolidations were not lawful prior to that date. Now, there would have to be some reservations to that.

Mr. SPLAWN. There were a great many consolidations.

Mr. HOCH. If they were not violations of the antitrust laws there was no other law to make them unlawful. There may have been many consolidations that were lawful.

Mr. SPLAWN. There were consolidations.

Mr. HOCH. Which were entirely lawful prior to that date.

Mr. HUDDLESTON. What I meant was that the act of 1920 was an enabling act. It merely lifted the prohibition which had previously existed.

Mr. HOCH. It made permissive certain consolidations which might have been in violation of the antitrust laws, aside from that act. But it was not permissive in the sense that no consolidation could have taken place prior to that.

The CHAIRMAN. Is not this the fact, Mr. Splawn, following up what Mr. Hoch has said, that there were acquisitions which were legal and there were probably acquisitions that were illegal under the then existing law, before February 28, 1920, and if they were, they could have been handled under the Clayton Act, and the Sherman Act, and so forth.

Mr. SPLAWN. Yes.

The CHAIRMAN. And we are not, by fixing February 28, 1920, relieving them of any law that existed before that time. And, as you have said in answer to Mr. Huddleston's questions and Mr. Bulwinkle's questions, all law in a later provision of this bill is preserved as it was in operation.

Mr. SPLAWN. Yes.

The CHAIRMAN. Mr. Beck, did you want to ask a question?

Mr. BECK. I would like to ask a question about this subparagraph (6) with reference to divestment. That appears to be very conservatively drawn. It does not permit the commission to prohibit the holding of any stock by any person until the commission, after an investigation, has been convinced that the stock is being held and used for the purpose of hindering the carrying out of the plan of consolidation.

Mr. BULWINKLE. That plan was not made until December, 1929.

Mr. SPLAWN. You are thinking of the ex post facto provision.

Mr. BULWINKLE. Yes.

Mr. SPLAWN. Of course, you are familiar with that line of decisions from Calder *v.* Bull on down, as to the ex post facto provisions of the Constitution; and Congress has passed many retroactive provisions. What would become unlawful if this bill were law is the holding of stock after the commission finds that it is being held in the hindrance of a plan already published, not the original acquiring of it. To be unlawful, stock would have to be held after the passing of this bill for the purpose of placing two or more carriers in a system opposed to the commission's plan.

Mr. BULWINKLE. That is the reason that I asked you the question, if in your opinion, was this stock, or the procurement of the stock illegal to begin with up to the present time, in your own knowledge.

Mr. SPLAWN. Under the bill?

Mr. BULWINKLE. I am not talking about this bill.

Mr. SPLAWN. The procurement of the stock was not necessarily illegal. I would not want to say as to every case that it was not, or in every case that it was. I would not want to pass on the legality of the several acquisitions. Some company might have acquired stock, the acquisition of which was perfectly lawful under existing law. Another company might have acquired stock, the acquisition of which under existing law was illegal. And the commission might find that the stock lawfully acquired was being used to defeat the will of Congress, and it might find that the stock illegally acquired was not being so used.

The CHAIRMAN. And, it would have a right, under this bill to cause them to divest themselves of the stock if they find the holding of that stock is not in the public interest.

Mr. SPLAWN. If after an inquiry, they are convinced that the holding of it is defeating a public purpose as set forth in the bill.

The CHAIRMAN. And that goes back to the proposition of the Interstate Commerce Commission before it can approve consolidation; it must find a public interest.

Mr. SPLAWN. Yes.

The CHAIRMAN. And therefore the reverse should be true.

Mr. HUDDLESTON. Now, this paragraph does not make such holding illegal. It leaves it legal, but requires divestiture.

Mr. SPLAWN. This paragraph (6) of the bill requires divestiture when it is found by the Commission that the company is interfering with carrying out the plan of consolidation in the way described.

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. But it does not go into the question of the legality of the original acquisition of the stock.

Mr. HUDDLESTON. It does not make it a crime, you mean?

Mr. SPLAWN. No; there is no crime, no criminal offense involved. There is no inquiry necessarily involved as to whether or not the acquisition was lawful or unlawful. The inquiry would be as to the use to which the stock holdings were put.

Mr. BECK. Mr. Chairman, may I ask a question?

Mr. HUDDLESTON. Just a moment, if I may.

It does not become illegal to so use it?

Mr. SPLAWN. I beg your pardon.

Mr. HUDDLESTON. It does not become illegal so to use it and does not the machinery provide the only remedy for such wrong use is divestiture?

Mr. SPLAWN. Divestiture; that is right.

Mr. HUDDLESTON. So that if the commission should not take action for divestiture, go in the courts and get it ordered, the holders of the stock might continue to exercise control.

Mr. SPLAWN. Except, under paragraph (5) of the bill, the commission might institute proceedings if it found that there was an unlawful combination effectuated. This paragraph (6) does not deal with the unlawful combinations already set up, as such. It is dealing with the interference in carrying out of a plan by setting up a railroad system contrary to the plan.

Mr. HUDDLESTON. And the only remedy for such an interference is court action? In other words, a finding by the commission that there is willful interference, has no effect beyond being the basis of

action which ultimate may result in the issuance of an injunction or other process?

Mr. SPLAWN. And then, as I explained yesterday, in addition the bill calls on the commission to do what it has already done, for example, in the case of the Western Maryland. In a procedure under the Clayton Act, the Baltimore & Ohio, I believe, was called upon to divest itself of the stock of the Western Maryland. I understand that that stock has been placed in the hands of a trustee, because the present market for the stock is not a very favorable market. This bill merely calls on the commission to do what it has already demonstrated it would do of its own motion; that is, not to force a company to divest at a sacrifice by compelling them to sell on a bad market and to sell immediately, and, also, the commission may merely require divestiture of the voting power, if that will overcome the difficulty.

Mr. HUDDLESTON. May I ask the significance of that part of the section beginning with line 20, on page 6, clause (6).

Mr. SPLAWN, (reading):

> For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith.

Mr. HUDDLESTON. Now, that is a mere declaration of the purpose of Congress, congressional policy?

Mr. SPLAWN. Yes.

Mr. HUDDLESTON. Just what significance has it?

Mr. SPLAWN. That is merely stating why the commission would act in any event—that is for protection of the plan.

Mr. HUDDLESTON. Is it essential to the meaning of the clause?

Mr. SPLAWN. Well, I would say that it makes clearer your intent, if you should enact this into law, your intent with reference to this divestiture, that there shall be divestiture when and only when it is necessary for a proper protection or for a furtherance of the plan of consolidation.

Mr. HUDDLESTON. It seems to me to lend an unnecessary emphasis to what the commission has already done in the way of adopting the plan.

Mr. SPLAWN. There is no intention there to deify the plan. The act, or law, as it now stands, and as it would be left in this bill provides for the reopening of the plan at any time. But suppose an effort is made to reopen the plan and the commission has a hearing and denies the application in some conceivable case, and then the persons who are denied say, "Well, we think we will just go ahead anyway."

Then the commission would say, for the proper protection and in the furtherance of the plan for the consolidation of railways, we want you to divest.

Mr. HUDDLESTON. The new paragraph (7) contemplates that pending this proceeding, if it appears that the commission has changed the plan action may be taken accordingly, and the preliminary part of paragraph (6) that I referred to would be quite appropriate if this paragraph (7) contemplated a change in the plan, as a consequence of the hearing.

Mr. SPLAWN. You mean pending the hearings under paragraph (6)?

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. Or as a part of the hearing?

Mr. HUDDLESTON. Yes.

Mr. SPLAWN. Under paragraph (6) it was contemplated that the commission would proceed in cases calling for divestment of stock. It is contemplated that it would know its mind by the time it initiated proceedings to divest. Even after it initiated those proceedings there is nothing to keep it from reopening the plan and if it should reopen the plan——

Mr. HUDDLESTON. Section (7) does not seem to contemplate that.

Mr. SPLAWN. Paragraph (7) says that if in the course of proceedings under paragraph (4) or paragraph (6) before the commission or any proceedings before a court in enforcement of an order entered by the commission, it appears that since the beginning of such proceedings the plan for consolidation has been reopened under paragraph (3) for changing or modification with respect to the allegations of the proponents, or any carrier involved in such proceedings, then such proceedings shall be suspended until the commission has made its decision under such reopened hearings.

Mr. HUDDLESTON. Of course, the reference paragraph (3) is a limitation, and I do not just see the disirability of that.

Mr. SPLAWN. You mean paragraph ——.

Mr. HUDDLESTON. The desirability of this in line 6.

Mr. SPLAWN. Yes.

Mr. HUDDLESTON. Under paragraph (3).

Mr. SPLAWN. If it appears that since the beginning of such proceedings a plan for consolidation has been reopedned under paragraph (3).

Mr. HUDDLESTON. Why is that necessary under paragraph (3)? Why not "in the course of these proceedings?"

Mr. SPLAWN. It is presumed that the commission will institute such proceedings under paragraph (6) only when and if its mind is made up that there is a company "acting up" and interfering by setting up its own system; a company that is so obstinate and so determined that to leave it alone would injure the public through the hindrance of a plan which had been well considered by the commission.

Now, if after the commission institutes that kind of proceeding it should get new information, it would reopen the plan under paragraph (3), not under paragraph (6).

Mr. HUDDLESTON. You say paragraph (3). Of course that means original paragraph (3) of section 5 of the Interstate Commerce act.

Mr. SPLAWN. No; that means paragraph (3) of the bill which is now paragraph (5) of the act.

Mr. HUDDLESTON. Under the new bill?

Mr. SPLAWN. Yes.

Mr. HUDDLESTON. The new numbering?

Mr. SPLAWN. The new numbering.

Mr. HUDDLESTON. It would be (3)?

Mr. SPLAWN. Yes; the new numbering would be (3).

Mr. HUDDLESTON. Well now, that paragraph requires very considerable formality.

Mr. SPLAWN. Yes.

Mr. HUDDLESTON. And it would seem to me that reference would constitute a very decided and important limitation on the powers of the commission under paragraph (7).

Mr. SPLAWN. Paragraph (3).

Mr. HUDDLESTON. Why could not those words "under paragraph (3)" be omitted?

Mr. SPLAWN. Because it is under paragraph (3) only that the commission is authorized to reopen the plan. In a proceeding, too, against a particular person, you would not want that proceeding to be construed as a reopening of the plan bringing all of the railroads in a region into that proceeding.

The CHAIRMAN. And, it would not be proper to have such proceedings unless it were in the public interest?

Mr. SPLAWN. That is correct.

Mr. HUDDLESTON. That a change in the plan should be made?

Mr. SPLAWN. Yes, and before they would get to a proceeding to divest, this would be what would happen. The commission would have had such hearings, on applications, as to have their minds pretty well made up as to the plan. Now, if there should be a conviction that they were in the wrong, and if that conviction were sufficiently strong, an application could be filed under paragraph (3) and the plan could be reopened.

But, I think it would be a mistake to let every proceeding to divest be an automatic reopening of the whole plan and bring in all of the railroads of a region to debate the plan because some person was holding some stock and using it to set up a combination of railroads out of harmony with the plan.

Mr. BECK. Mr. Chairman, before we adjourn, could I just direct the witness's attention to one matter that we can hear him on to-morrow?

The CHAIRMAN. I had intended to go on with Mr. Eastman, to-morrow, but if you want Doctor Splawn to come back, for some minutes, that can be done.

Mr. BECK. I would be glad to have him here.

Mr. IGOE. I would like to have him back.

Mr. BECK. I also understand, and if I am not correct in this, I want you to correct me, that it was never the intention of Congress to make this plan compulsory upon the carriers. Am I right on that. or is that incorrect?

Mr. SPLAWN. Compulsory on the carriers?

Mr. BECK. Yes; I mean, to accept the plan of consolidation.

Mr. SPLAWN. Yes and no; I think I would say, Judge Beck. It is not compulsory in the sense that they just have to come into it; but it is compulsory in the sense that they can not go and do something else.

Mr. BECK. As I understand the policy of Congress was that the Interstate Commerce Commission should formulate a plan for consolidation of the carriers into a certain number of great systems. It, however, was not contemplated that if the carriers did not want to do it they were compelled to do so.

Now, I want to direct your mind to that, so that we may get the benefit of your views hereafter, as to how far this legislation, especially its retroactive features, would go, in making a plan of the commission compulsory upon the carriers if the carriers insisted that they did not want to go into it.

I also want to address your mind to this proposition, whether the effect of it is not to transfer judicial functions of the courts to the Interstate Commerce Commission in the matter of this divestiture of

holdings that were acquired unchallenged by the Government and therefore presumably lawfully.

The Northern Securities case to which you referred—and which I ought to know something about, because I argued it before the three statutory judges—was a case where the courts found that the Northern Pacific and the Union Pacific has pooled certain issues of stock for the deliberate purpose of eliminating competition between the respective carriers. There, at least, they had their day in court with respect to the matter. Now, however, you purpose under this law to vest in the commission the power to say to the people who have acquired holdings since 1920, unchallenged by the Government, therefore presumably perfectly lawfully, that they shall have no day in court whatever and that the commission shall determine that they must divest themselves of these holdings. It is true that you have a guaranty by stating that there shall be some method provided for marketing these securities that will preserve—I think the expression is, the "normal market value." But what is normal market value? I do not know. I wish I did. I might be able to be helpful to myself if I did. But, I do not know what normal market value is. Independently of that, you are giving the commission the power to say to men and to companies who for 12 years have acquired holdings in other companies, the right to say, "You must divest in the manner that we prescribe, and in no other manner, and you must take your control, your own stocks, and vest it in certain trustees that we shall name."

Now, that seems to me to deny them the right to hearing in court, which might be wanting in due process of law.

I want you to think that over, and if you can come back later, discuss that feature. If you can, I will be very much obliged to you.

The CHAIRMAN. I would suggest this, that you talk it over with Mr. Eastman. See what Mr. Eastman can do about being here tomorrow. Doctor Splawn is available and can come back most any time. Mr. Eastman may not be able to do so.

Mr. IGOE. Now, Mr. Chairman, in view of the motion that I made yesterday, and the discussion on that motion, I want to call attention of the committee to the effect on the stock market of our action yesterday.

Railroad shares declined, but the decline was more pronounced in those stocks affected by this bill. The Atchison closed at 84¾ down 4 points.

The CHAIRMAN. How much did it close down the week before, have you got that?

Mr. IGOE. I just looked at the paper of yesterday, so I do not know. It was down 4 points yesterday.

Baltimore & Ohio closed at 17½, down 1⅛; Chesapeake & Ohio closed at 24⅞, down 2⅝; Colorado & Southern closed at 11, down 4.

New York Central closed at 30½ down 2½;

New Haven Railroad closed at 26⅞, down 2⅛;

Pennsylvania R. R. closed at 20⅞, down ⅞;

Wabash closed at 3½, down ¼.

You will note in the above stocks, the decline was almost 10 percent in one afternoon. This was far greater than the general decline in the whole list.

I think that that was because of the publicity that was given to our action yesterday.

The CHAIRMAN. Do you think that it is a fair statement to make that and not say what directly went before on the same day a week ago, or the day before, even.

Mr. IGOE. The market had been stable for about 10 days, practically, not fluctuating over a point.

Mr. CHAPMAN. Mr. Chairman, I would like to ask if railroad stocks are the only ones that declined.

Mr. IGOE. Railroad stocks were affected by this bill.

The CHAIRMAN. How do you know that they were affected by this bill? They have been going down ever since 1929, have they not?

Mr. CHAPMAN. And also other stocks.

Mr. IGOE. That is what I am trying to correct. That is what I am trying to do.

The CHAIRMAN. And, since this bill has been introduced, which has been several days. Everybody knows what is in it.

Mr. IGOE. I did not want to give them any grounds for a scare.

Thereupon, at 11.46 o'clock a. m., the committee adjourned to meet the following morning, at 10 o'clock a. m., Friday, February 19, 1932.

105084—32——4

REGULATION OF RAILROAD HOLDING COMPANIES

FRIDAY, FEBRUARY 19, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF HON. JOSEPH B. EASTMAN, COMMISSIONER, INTERSTATE COMMERCE COMMISSION

The CHAIRMAN. All right, Mr. Commissioner.

Commissioner EASTMAN. My name is Joseph B. Eastman, member of the Interstate Commerce Commission.

I have a prepared statement, Mr. Chairman, which has been distributed to the members of the committee, but I may depart from it at one or two points.

I appear as chairman of the legislative committee of the commission. In its recent annual report the commission made a recommendation for legislation which was summarized, at page 21, as follows:

> Recommendation 9: That section 5 (2) of the interstate commerce act be amended so as to bring within the jurisdiction of the commission for approval or disapproval any acquisition of the control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding companies or otherwise; and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the commission.
>
> It is also suggested that it may be desirable to authorize the commission to require the divestment by any noncarrier company of a controlling interest in a carrier by railroad subject to the act, if such stock interest has not received the approval of the commission and is found to be prejudicial in any respect to the plan of consolidation adopted by the commission under section 5 (5) of the act.

This recommendation was in turn, as is shown by the discussion on pages 84–86, in harmony with the recommendations made by the special counsel for your committee in the report on the holding company situation, which was printed at the last session of Congress as House Report No. 2789.

H. R. 9059 undertakes to carry out these recommendations but goes somewhat beyond them in proposing a further revision of section 5 of the interstate commerce act in certain respects. I shall comment on that later. With the purpose and intent of H. R. 9059 the legislative committee of the commission is in sympathy. My discussion of the provisions of that bill, however, will be made on my own responsibility.

At the outset it may be of help to state, briefly, the problem which H. R. 9059 is designed to meet, as I understand it. In section 5 of the interstate commerce act Congress has manifested a clear purpose to place the consolidation or unification of the railway properties of the continental United States into a limited number of systems completely under the control of the commission. Without such a purpose the provision for a consolidation plan would be meaningless. Experience has shown, however, that as it stands section 5 does not accomplish that result. On the contrary, unifications may be, and in important instances have been, effected without any supervision whatever by the commission.

This situation has repeatedly been brought to the attention of Congress by the commission. In so doing, the commission has not been seeking to enhance its own power and authority. As stated, it seems clearly to have been the intent of Congress in section 5 to subject the matter of unification into systems completely to commission control. If this was the intent, as we believe, it has not been accomplished, and it is that fact which we have sought to make clear. Whether or not this deficiency should be corrected is, of course, for Congress to decide.

An important weakness of section 5, as it now stands, is that it places no control upon the activities of so-called holding companies in effecting unification of railway properties into systems. Three illustrations will suffice to show possibilities in this direction. And here, I may be covering ground which Doctor Splawn has already covered.

The CHAIRMAN. If he has, you can go right on with your statement.

Commissioner EASTMAN. This is in summary form and it may be helpful for that reason:

1. The Pennsylvania Railroad Co. completely controls and dominates the Pennsylvania Co., which is a holding company pure and simple. Through this holding company the Pennsylvania Railroad has, we believe, acquired control of the Wabash and the Lehigh Valley Railroads. These acquisitions have not been approved by the commission, and the Pennsylvania Railroad denies that the commission has any jurisdiction over them under section 5. In this instance the control which the Pennsylvania Railroad exercises over the holding company is so direct and complete that we are not prepared to concede that the acquisition is not subject to the provisions of paragraph (2) of section 5. Nevertheless the present wording of that paragraph leaves this jurisdiction open to question, and the Pennsylvania Railroad has proceeded in entire disregard of its provisions. I may say that in the case of those acquisitions it is the belief of the commission, and it has so found, that they were in violation of the provisions of the Clayton Act, and the matter is now pending in court.

2. The so-called Van Sweringen interests have, we believe, acquired control of the Chesapeake & Ohio, the Erie, the Nickel Plate, the Pere Marquette, the Missouri Pacific, and probably the Chicago & Eastern Illinois Railroads. The bringing of these railroads under common control has not been sanctioned or approved by the commission, with the exception that it has authorized the Chesapeake & Ohio to acquire control of the Pere Marquette. The commission refused to approve the acquisition of control by the Nickel Plate of the Erie and the Chesapeake & Ohio (105 I. C. C. 425) and on another

occasion it refused to approve the acquisition of control by the Chesapeake & Ohio of the Erie (138 I. C. C. 517). Nevertheless all of the roads mentioned have been brought under common control. This has been done in large part through the agency of several holding companies, the most prominent being the Alleghany Corporation. The complicated interrelations of these holding companies and of the railroad companies in question are shown in detail in House Report No. 2789. Here the common control of the railroad companies, which is generally recognized as actual and effective, has been accomplished in a way which has been most cleverly disguised. It has not been done through any one holding company, but through a tangled maze of holding companies which have utilized the resources of certain railroad companies, both directly and indirectly. Ultimate control seems to rest in certain individuals and banking concerns. There has apparently been a deliberate attempt to create a common control most difficult to analyze and equally difficult to trace and prove in a court of law. The corner stone of the structure rests in the financial resources of the Chesapeake & Ohio Railroad. In three charts which are included in House Report No. 2789, between pages 878 and 879, a most interesting attempt has been made to analyze this maze in diagram form. In the third of these charts it is shown that the equities of the two then dominant individuals, O. P. and M. J. Van Sweringen, in the five principal railroads comprising the system, based on their proportion of contributed capital as of April 30, 1930, were as follows: Nickel Plate, 0.6879 per cent; Chesapeake & Ohio, 0.9815 per cent; Pere Marquette, 0.6387 per cent; Erie, 0.6015 per cent; Missouri Pacific, 1.6904 per cent.

This system also has important interests in anthracite coal mining and distributing companies and in a so-called car-forwarding company.

3. The third illustration is a holding company, known as the Pennroad Corporation, which has operated in the interests of the Pennsylvania Railroad but is not controlled by it through ownership of stock.

Mr. BECK. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Beck.

Mr. BECK. I would like to ask a question, if it will not interrupt you.

Commissioner EASTMAN. Yes, sir.

Mr. BECK. You have just read the figures on page 4, Mr. Eastman, and the last figure about the Missouri Pacific makes me wonder if you mean that they (the Van Sweringens) controlled 68 per cent of the capital stock of the Nickel Plate.

Commissioner EASTMAN. No.

Mr. BECK. It is less than 1 per cent?

Commissioner EASTMAN. It is less than 1 per cent.

Mr. BECK. That is what I imagined from the fact that the Missouri Pacific was 1.6904 per cent. I wanted to be clear as to whether I understood you correctly.

Commissioner EASTMAN. That does not mean that they controlled only that percentage. It means that their money interest in the property amounted only to that percentage of the total contributed capital.

Mr. BECK. Oh, yes. I just wanted to be sure that I understood you. Thank you very much.

Commissioner EASTMAN. This holding company was created by the Pennsylvania Railroad ostensibly to protect its interests and those

of its stockholders. The first right to subscribe to the stock of the Pennroad Corporation was given to the stockholders of the Pennsylvania Railroad, and control by the latter company was assured through a 10-year voting trust, under which three directors of the Pennsylvania Railroad, one of whom was its president, were appointed to act as voting trustees, with authority to select their successors. This holding company has acquired controlling stock interests in the Detroit, Toledo & Ironton, the Pittsburgh & West Virginia, the Raritan River, and the Canton Co. Railroads, and substantial interests in the Boston & Maine, the Seaboard Air Line, and the New Haven, as well as lesser interests in other railroads. Coupled with stock interests which the New Haven has in the Boston & Maine and which the Pennsylvania Railroad has directly in the New Haven, the acquisitions of the Pennroad Corporation have given the Pennsylvania Railroad a very large voice in the affairs of the two principal New England railroads, just how large it is difficult to determine.

Mr. LONERGAN. May I ask a question, Mr. Chairman?

The CHAIRMAN. Mr. Lonergan.

Mr. LONERGAN. The report of the governor's council of New England shows that their ownership is approximately 44 per cent.

Commissioner EASTMAN. You mean of the——

Mr. LONERGAN. Pennsylvania stock holdings in the New York, New Haven & Hartford Railroad Co., and the holdings of the latter in the Boston & Maine.

Commissioner EASTMAN. Oh, yes; I have not checked that figure.

All of the stock interests, controlling or otherwise, were acquired without any supervision by the commission, and under the theory that the commission is without jurisdiction. The Pennroad Corporation also has a controlling interest in a so-called car-forwarding company.

Apart from section 5 of the interstate commerce act, the commission has certain jurisdiction under the Clayton Act over acquisitions of control, direct or indirect, of one railroad by another, or acquisitions of common control of two or more railroads, where it can be established that the effect of such acquisitions may be to substantially lessen competition between the corporations involved, or to restrain the commerce in which they are engaged, or to tend to create a monopoly, of any line of commerce. But the enforcement of the commission's authority to break up such combinations after they have been put together is hedged about by many difficulties, and probably no such authority exists under the Clayton Act in the case of certain of the unifications which have been accomplished in the manner above described.

Whether or not all or any of these unifications are consistent with the public interest it is unnecessary for present purposes to determine, although I may say I am prepared to discuss that question later if the committee so desires. The important point to which we direct attention is that they have been accomplished entirely without supervision by the commission and without any opportunity on the part of the commission to consider the question of public interest. If, as we believe, it was the purpose of Congress to place the unification of the railway properties of the United States within the control of the commission, these illustrations show that wide opportunities exist for accomplishing such unifications without any such control

in complete defeat of this purpose, and that these opportunities exist utterly irrespective of what the public interest may be.

Nor is it an answer to say that the situation with respect to these unauthorized and unsupervised acquisitions can be straightened out in connection with proceedings before the commission in which authority may be sought to effectuate the so-called 4-system unification plan in eastern territory, if that plan is approved by the commission. What the railroads and the holding companies may be willing to do may be one thing if the commission approves the 4-system plan, and quite another thing if it disapproves in whole or in part. And the power of the commission to require a readjustment of the situation which the holding companies have brought about without supervision, by attaching conditions to its grants of authority under section 5, has not as yet been defined by the courts. Legislation of the kind proposed in H. R. 9059, or having a similar purpose, would greatly strengthen the hands of the commission in dealing with this situation, as well as prevent future similar situations from arising.

But while it is easy to recommend that the deficiencies in the law which I have pointed out be corrected, it is not at all easy to say how they should be corrected. The possibilities open to legal ingenuity of evading governmental supervision of a matter like this are legion, as is well indicated by the illustrations which I have already given. If Congress in drafting a remedial measure could secure the help of counsel with ingenuity and experience incorporate practices and possibilities equal to those of counsel who devised the corporate maze which the Van Sweringens have employed in their operations, it would no doubt be desirable. I say that without any reflection on your own legislative draftsmen, but on a principle somewhat akin to the principle—I do not say it is the same—that it takes a thief to catch a thief.

Mr. WYANT. How many lawyers and how are they employed by the commission?

Commissioner EASTMAN. We have a great many lawyers.

Mr. WYANT. Several hundred?

Commissioner EASTMAN. No; I would not say several hundred. I do not think there are that many.

Mr. WYANT. My information is that two hundred and fifty some.

Commissioner EASTMAN. It may be. Most of them are examiners, rate examiners, who conduct rate cases.

Mr. WYANT. I would think that out of 250 lawyers there ought to be some good ones.

Commissioner EASTMAN. Well, we have secured good advice on this, and I think that we have good lawyers. I merely suggest that it is an extremely difficult legal problem, and that those that have had the greatest experience with questions of this character are those that would be of the greatest help. Our lawyers have not had any large experience in such matters.

Mr. MAPES. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. While the commissioner has his mind off of his manuscript, I would like to ask a question. Mr. Eastman, you say, on the second page of your statement, that "With the purpose and intent of H. R. 9059, the legislative committee of the commission is in sympathy."

For my own information, I would like to know what the legislative committee is, and if it represents the commission, and why you confine that statement to the legislative committee.

Commissioner EASTMAN. The legislative committee is composed of three men. I am the chairman and the other members are Commissioner Farrell and Commissioner Porter.

The legislative committee acts, not for the commission, necessarily, but under authority of the commission with respect to these legislative matters. It does not undertake to speak for the commission, unless the matter has been referred directly to the commission.

In the case of this particular bill, the commission itself has gone no further than to make the recommendations which I read at the very beginning of my statement. So far as the legislative committee is concerned, I stated that it is in sympathy with the purposes and intent of this bill, for this reason, that it has considered and approved two prior drafts of H. R. 9059, but I think that after its last approval some details were added, and I did not want to commit the legislative committee to those details.

If the committee desires to have this matter considered by the entire commission, and a statement made as to just what the attitude of each member of the commission is, with respect to it, I shall be glad to do that. The only reason that it has not been done so far is because of the pressure of time and work.

Mr. MAPES. But, for the present, you are not able to say that the commission as a whole recommends this bill; is that correct?

Commissioner EASTMAN. All I can say is that it made the recommendation in its annual report which I read, and which I believe to be largely in harmony with this bill.

Mr. MAPES. I merely desired to get that cleared up in my own mind.

The CHAIRMAN. In other words, what you intended to say was that the full commission in its annual report indorsed the principles that are embodied in this bill.

Commissioner EASTMAN. Exactly.

Mr. IGOE. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Igoe.

Mr. IGOE. I understand that this bill was drafted by you and Doctor Splawn. Is that correct?

Commissioner EASTMAN. No; that is not entirely correct. I had something to do with the drafting of it. I believe—in fact, I know—that your legislative draftsmen had a good deal to do with the drafting of the bill.

The CHAIRMAN. I stated the entire facts about the drafting of this bill here. I have stated it to the committee twice. I stated it executive session, and I stated it here yesterday, I said that when this bill was put together, myself, Mr. Parker, Mr. Eastman, Doctor Splawn, and Mr. Perley were present, and that is true.

Mr. BECK. Mr. Chairman, did I understand then that so much of this bill as makes the invalidation of these holding companies—let me put it this way: Am I to understand then that the commission, as a commission, has never approved so much of this bill as invalidates the holdings back to 1920, and gives the commission the power to supervise the divestiture of all stocks acquired since 1920?

Commissioner EASTMAN. All that the commission has said on that point, Mr. Beck, was said in the quotation from the annual report, which I read.

Mr. BECK. Does that refer to the retroactive feature?

Commissioner EASTMAN. It says:

> It is also suggested that it may be desirable to authorize the commission to require the divestment by any noncarrier company of a controlling interest in a carrier by railroad subject to the act, if such stock interest has not received the approval of the commission and is found to be prejudicial in any respect to the plan of consolidation adopted by the commission under section 5 (5) of the act.

Mr. BECK. I note it says "it may be."

Commissioner EASTMAN. Yes. The commission did not commit itself beyond that point.

Quite apart from the opportunities to evade its provisions which now exist, there are certain rather patent defects in the present section 5. And I speak now definitely of the details, not of the general plan of the section at all. H. R. 9059 does not change the purpose or the general plan of section 5. The only changes which it makes are in details. Acquisitions of control may be authorized under paragraph (2) and actual consolidations under paragraph (6). The provisions of the latter paragraph, however, have not as yet been utilized in a single instance. I think that is an important fact and I call it to your attention that there has not been a single instance where paragraph (6) has been utilized. All of the unifications which have been accomplished since 1920—and there have been many of them—have taken the form of acquisitions of control under paragraph (2). Paragraph (6) is so worded that many interpret it as covering only consolidations in the technical legal sense, that is, the absorption of the properties of two or more corporations by a new and separate and distinct corporation. I do not agree with that interpretation, but it is an interpretation which many put upon paragraph (6). So interpreted, it does not cover mergers or purchases of properties. The paragraph is also so worded that it may not cover technical consolidations, where the consolidated properties have theretofore been operated or managed in common, although separately owned.

Mr. HUDDLESTON. May I ask a question?

Commissioner EASTMAN. Yes, sir.

Mr. HUDDLESTON. Referring to your comment on the difficulty of drafting a statute to deal with all possible evasions of the law against consolidations, may I ask what you would think of the effect of a provision forbidding the ownership of the stock of a carrier corporation, by another corporation and requiring that the stock be owned by individuals, and each share to have equal voting power and without power to pool or intrust it.

Commissioner EASTMAN. Why, I am not prepared to recommend that, Mr. Huddleston: Of course, that goes considerably beyond what is proposed here, and I should suppose that that would interfere with the holding of stock in railroads by a good many corporations where there might be no possible objection to such holdings. It might interfere with holdings by banks, or by charitable organizations, or by strictly investment companies, and so on.

Mr. HUDDLESTON. We have financial set-ups, with the infinite complexities that you have pointed out. Just what useful purpose do you conceive that those complexities serve?

Commissioner EASTMAN. Well, the complexities such as I have spoken of in connection with the creation of the holding companies, I do not think serve any useful purpose.

Mr. HUDDLESTON. You have called attention to the devices under which a very small amount of capital is able to dominate a great corporation. Does that serve any useful public purpose?

Commissioner EASTMAN. Not in my opinion.

Mr. HUDDLESTON. The chief difficulty in dealing with this situation seems to me lies in the tender approach we seem to want to make to it. If we chose to deal with it radically, it would be very easily prevented, but if we play the game according to the rules laid down by those who have developed the device, that is different.

Mr. SHALLENBERGER. I would like to ask a question.

The CHAIRMAN. Mr. Shallenberger.

Mr. BECK. Referring to one further matter, Mr. Eastman, has any court, or any recognized publicist, ever expressed the opinion that to hold less than 1 per cent of capital stock of a corporation means its control?

Commissioner EASTMAN. No; not so far as I know, Mr. Beck. However, I think it is often the case, through these pyramiding processes, that by an investment which is no greater than the percentage which you indicated, it is possible to exercise control over a corporation.

Mr. BECK. I would like to confirm that by an illustration I used the other day, Mr. Eastman. I happen to know that Mr. Havemeyer controlled for years the American Sugar Refining Co., and when he died he did not have 200 shares of stock, if I recall correctly; but that would not be a case of holding stock, but was because of his dominating personality.

Commissioner EASTMAN. I am speaking of control in the other way, principally through the process of pyramiding.

Mr. BECK. Yes.

Commissioner EASTMAN. You take the controlling stock interest and put that in the hands of a holding company, and by that means you can reduce the amount of investment necessary for control, and, if the process be repeated, you can arrive at a point where a very small investment will exercise control over the original company.

Mr. SHALLENBERGER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. I want to ask Mr. Eastman if these combinations or the acquiring of control of these railroads, contrary to the policy of the commission, have been against the public interest in any case, as the commission views it? Perhaps I ought not to ask you that.

Commissioner EASTMAN. Well, I said in my statement, which I have already made, that it did not seem to me that that was an important question here. However, I am willing to discuss that, but I prefer to defer that matter, if you do not mind.

Mr. SHALLENBERGER. That is all right, certainly.

Are you prepared to tell us in the opinion of the commission, why they have done this, was it for the promotion of the public interest, or economic improvement of the railroads to be able to earn better returns from the railroads; what has been the motive behind it?

I think that would be important to have, if you can tell us that.

Commissioner EASTMAN. Well, I think there have been a great many different motives.

Mr. SHALLENBERGER. I beg your pardon. I did not hear the answer.

Commissioner EASTMAN. I think that there have been a great many different motives entering into these operations. I think in some cases it has been for the purpose of effecting a union of railroads which it was thought would result in greater economies. I think in other cases it has been for purposes of strategy to acquire control of certain railroads to prevent others from getting control and to be in a better position to control the ultimate union of the companies. I think in other cases the idea has been to secure control or influence in a given railroad for the purpose of securing a greater amount of its traffic, and depriving competitors of an equal amount of traffic.

May I proceed, Mr. Chairman?

The CHAIRMAN. Yes.

Commissioner EASTMAN. You will note that in the first paragraph of the present paragraph (6) it says:

> It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation.

This may be construed to mean that there must theretofore have been not only separate ownership, but also separate management and separate operation. Now, there are a good many cases where properties are not now separately owned but are managed and operated in common, and where it is desirable to consolidate them for the purpose of accomplishing accounting or other economies. It has been urged that such consolidations can not be accomplished under the present paragraph (6). I think that is too narrow an interpretation, but it is one which has been placed upon the section.

Furthermore, the provisions of subdivision (b) with respect to the capitalization of the consolidating corporation are likely to lead to long delay and are not in all instances capable of application. That matter was discussed in the hearing on section 15a. It is for these reasons, no doubt, that paragraph (6) has not been utilized.

Paragraph (2), relating to acquisitions of control, was apparently designed originally to serve chiefly as a stop-gap prior to the adoption of the complete plan of consolidation. It made unifications of a less permanent form possible until such time as actual consolidations could be effected. Now that the plan has been adopted, no good reason appears why paragraphs (2) and (6) should not be combined.

H. R. 9059 undertakes to cure these defects. The new paragraph (4) on page 2 is a substitute for the present paragraphs (2) and (6). It proposes to authorize, under commission supervision, every legitimate and desirable method of combining railway properties, including consolidations, mergers, purchases, leases, operating contracts, and acquisitions of stock control of carriers by other carriers, and also by a single holding company.

Now, that last method of acquisition by a single holding company is the only one which personally I believe is not included in the present provisions. It would not offend me if that were omitted. It was put in, and I think I was responsible for putting it in, because of the chapter in House Report No. 2789 by Professor Bonbright entitled, "Shall the Railway Holding Company be Outlawed?" He made a good argument to the effect that union through a holding company

might at times be desirable. All combinations under the methods specified, must be in harmony with and in furtherance of the plan of consolidation, and the commission must find that they will promote the public interest before approving them. The commission is also given full authority to prescribe modifications and just and reasonable terms and conditions, just as in the present law. It is further provided that if union through the medium of a noncarrier holding company is authorized by the commission, the latter shall have jurisdiction over the capitalization of such holding company and power, in its discretion, to regulate accounting, inspect books and records, and require reports. The provisions of the present subdivision (b) of paragraph (6) with respect to the capitalization of the consolidating company are omitted, because the public interest is completely protected in this respect by section 20a of the interstate commerce act. That matter, as I say, was covered in the section 15a hearings.

In my opinion this proposed change in section 5, which is embodied in paragraph (4) of H. R. 9059, is of great importance and highly desirable. At present, unifications are being accomplished very largely in the two least desirable ways, either through purchases of stock or through leases. One of the worst features of the railroad situation from the financial point of view is the extent to which the properties have been mortgaged and the heavy load of fixed charges which they carry. In the ordinary case, a lease has the disadvantage of converting a contingent return on stock into a fixed rental charge. Where this is done it has the same effect as though the stock were converted into mortgage bonds. Acquisitions of control through stock purchases are also very likely to result in an increase in fixed charges, because the ordinary railroad can procure cash for such purchases, in the long run, only by selling bonds, or giving notes.

In the railroad and financial world the idea seems to be very widely held that the only way in which railroads can be combined is by buying up stock. A good deal is said about picking up stock quietly at low prices. As a matter of fact it seldom works out that way. If you will examine the record of the past, you will find that when one railroad has acquired control of another through purchase of stock, or when the same thing has been done by a holding company, the stock has usually been bought at high, or comparatively high, prices, often at very high prices. This is quite natural, because it is when stocks are selling at good prices that money is available to buy them. The present time offers extraordinarily good opportunities for buying up stocks at low prices, but by and large this is not being done, because the money is not available. If it were available and were put to such use, the market prices of the stocks would rise.

The stock-purchasing operations which were conducted a few years ago for the purpose of accomplishing, or preparing to accomplish, certain railroad unifications had an unfortunate effect upon various railroads. The Wabash Railway is a good illustration. That railroad has a relatively large capitalization in comparison with the value of its property. It was not able to market new issues of stock, and could obtain cash for capital expenditures only from earnings or by further issues of bonds, or increasing indebtedness in other ways. It expended nearly $24,000,000 in buying Lehigh Valley stock at a price not very far from $100 per share. The same stock is now selling at about $16 per share. The par value is $50. As a result of these purchases it was forced to increase its indebtedness very materially. Quite a number of railroads purchased stocks of other railroads during this period at prices which now appear very high, and to obtain these mere equities in other properties increased their own indebtedness, and hence their fixed charges.

This method of putting roads together is, of course, one which has certain appeals to the bankers. They obtain commissions from negotiating or making purchases of shares; they obtain commissions or profits from the sale or disposition of the new bond or note issues which are necessary in order to secure cash for the purchases; and at times they are able to profit from the upward movement of stock prices created by the campaign of acquisition. The effect of such campaigns is to stimulate a condition of unhealthy speculative fever in the market. That is one of the reasons why anything with respect to consolidations is front page news, whereas other railroad happenings of equal or greater importance sometimes find difficulty in securing a place on the most humble inside page. The effect is apt to be bad on railroad managements also. The furor over consolidations has, I am inclined to think, diverted attention from other vital railroad problems.

In my judgment there are better ways of putting railroads together than by leases or by acquisitions of stock at high prices coupled with an increased burden of debt. If it can be shown that the union of two railroad properties will benefit both—and there is no other sufficient reason for unifications—then I have never been able to understand why it should be impossible for the directors of the two roads to sit down together, agree upon the terms of union, and submit a plan to the stockholders for their approval accompanied by a complete and convincing statement of the advantages to be gained. Such a plan could take the form of a consolidation, a merger, or a purchase of properties, and in that event it could be accomplished without any substantial expenditure of cash or increase in debt through an exchange of stock in appropriate ratio.

As a matter of fact, that was one of the attractive features of the proposed merger of the Great Northern and Northern Pacific. There were other features which I thought were less attractive, but as far as this feature was concerned, while the proposed transaction was put in the form of an acquisition of control, they were actually proposing to put those two roads together, very largely by an exchange of securities, without expenditure of cash or increase of indebtedness. A union of this character could be accomplished in times of depression as well as in times of prosperity. Now, I realize that there were certain situations where it probably is impossible to bring about a union in that way, but there are many instances where it is possible.

Under section 5 as it now stands, however, there is insufficient incentive or even opportunity for such transactions. The provision of paragraph (6) do not clearly provide for mergers or purchases of properties, as distinguished from consolidations, and even the latter are of doubtful practicability. Paragraph (4) on page 2 of H. R. 9059 is intended to cure this defect. It is not designed to change the general tenor or purport of the provisions of section 5 in any material respect, but merely to perfect those provisions. Instead of standing in the way of unifications, it opens a wider door to them by perfecting

the details of section 5 and removing certain technical obstructions which, presumably, if they exist, were inadvertent rather than intentional. By thus providing and paving the way for every legitimate method of combining railroad properties which may conceivably be desirable—and if there are any others which anyone thinks ought to be put in, they can be included—it supplies a logical and altogether appropriate background for provisions, such as were contained in the original bill, H. R. 5324, designed to restrain all undesirable methods of unifying railroads by means of holding companies or otherwise.

Mr. BECK. Mr. Chairman, I understand that the House is to meet at 11 o'clock this morning. Is it your intention to adjourn?

The CHAIRMAN. We have no authority to sit while the House is in session, if anybody makes a point.

Mr. BECK. Personally, I would like to be over in the House to-day, at the opening, but I do not want my wishes to interfere with the committee. I just wanted to know whether you intended to adjourn.

The CHAIRMAN. If any member of the committee feels that he wants to hear Mr. Eastman's statement, and also desires to be on the floor of the House when it convenes at 11 o'clock, we can adjourn the hearings now. I do not want to force anybody to make the point.

Mr. IGOE. Could we go on with Mr. Eastman's statement? He has only five more pages.

Commissioner EASTMAN. I have more than that, Mr. Igoe. There are certain things that I want to insert.

The CHAIRMAN. I think that we might be a little nervous with the House in session, Mr. Eastman, so if you can come back Tuesday, we will be very much obliged to you.

(Thereupon, at 10.55 o'clock a. m., the committee adjourned, to meet at 10 o'clock a. m., Tuesday, February 23, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

TUESDAY, FEBRUARY 23, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF HON. JOSEPH B. EASTMAN, COMMISSIONER, INTERSTATE COMMERCE COMMISSION—Resumed

The CHAIRMAN. All right, Mr. Eastman, we are ready for you to proceed.

Commissioner EASTMAN. I want to make a correction, Mr. Chairman, in my testimony of last Friday. I think I stated that the Wabash Railroad had acquired stock in the Lehigh Valley at a price of nearly $200 per share. That should have been nearly $100 per share. I am taking the liberty of correcting the transcript accordingly. The mistake came about through the fact that I had the par value of the stock and the amount paid for it, and in my computation I assumed that the par value per share was $100, whereas it was $50. On a $100 basis the price would have been nearly $200.

Before discussing the provisions of the bill which are designed to restrain all undesirable methods of unifying railroads, by means of holding companies or otherwise, let me call your attention to the conditions attached to the proposed paragraph (4). The one designated (A) on page 2 is similar in all respects to the present subdivision (a) of paragraph (6) of section 5. That provides that the proposed consolidation, merger, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the complete plan of consolidation of railway properties.

Now, it may be said that in the present section 5 that provision does not apply to acquisitions of control, but only to consolidations. However, since the consolidation plan has been promulgated, the commission has proceeded on the theory that no acquisition of control ought to be approved unless it is in harmony with the plan, and that principle has apparently been accepted by the carriers, because whenever they have asked approval of an acquisition of control which was not in harmony with the plan, they have at the same time asked for a change in the plan. That occurred, for example, in connection with the acquisition of the control of the Cotton Belt by the Southern Pacific.

Likewise the subdivision designated (B) is similar to the present subdivision (c). The one designated (C) beginning on page 3 is a new provision. The necessity for it arises because it seemed desirable

to provide in paragraph (4) for possible approval by the commission of a method of putting two or more railroads together through the medium of a single holding corporation. I think I said last Friday that the reason why I thought that ought to be included was because Professor Bonbright in the chapter which he wrote for House Report 2789, entitled "Shall the Holding Company be Outlawed?" made a very good argument for the use of a single holding company to bring about a union of railways under certain conditions.

I question whether adequate occasion for such a method could be shown except in rare instances, but it is conceivable that this could be shown. In such an event, the condition designated (C) provides that the holding company shall be subject to the supervision of the commission with respect to accounts and capitalization, just as if it were a carrier. This is necessary in the public interest, for in the event of combination through such a holding company, the latter becomes a medium for financing and administering the affairs of the controlled railroad companies, and supervision of its operation will be just as essential as supervision of the operations of the carriers.

Having authorized in paragraph (4) every method of combining railway properties that may conceivably be desirable in the public interest, the new paragraph (5) on page 4 of H. R. 9059 contains a general prohibition against every other means of bringing two or more railroad companies under common control or management in a common interest,

however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever.

It is realized that the enforcement of this prohibition may be very difficult. The commission might find it a prodigious and perhaps impossible task, particularly since it is not armed with authority to search the books and records of individuals, partnerships, associations, and noncarrier corporations, to obtain the proof necessary to establish a violation. This is one of the inherent difficulties of the problem, and I know no sure way of avoiding it. The same criticism applied to H. R. 5324. However, the proposed paragraph (5) would be a clear declaration of legislative policy to be violated at peril. I believe that it would operate as an effective deterrent, especially since the proposed paragraph (4) authorizes, or can be made to authorize, every method of combining railway properties that the public interest may conceivably demand.

The broad prohibition is contained in the first subdivision of paragraph (5), designated (a). The remaining subdivisions are inserted as a further guide to the construction or interpretation which is to be placed upon the prohibition. My understanding is that they were drafted after a very careful consideration of the report of your special counsel which was printed at the last session as House Report No. 2789, and are designed to cover methods of accomplishing effective common control of railroad properties, now outside the supervision of the commission, which have actually be utilized in holding-company operations.

These explanatory provisions are intended to spell out to the law-enforcing bodies precisely what Congress intends to prohibit, in order that possible opportunities for doubt or misunderstanding may be removed. It is often difficult to prove in a law court and to the satisfaction of the law things which are well known to all the world. As an illustration, no railroad man or financier or financial writer has any doubt whatever that the Nickel Plate, the Erie, the Chesapeake & Ohio, the Pere Marquette, the Missouri Pacific, and the Chicago & Eastern Illinois Railroads are all under common control, or that the Detroit, Toledo & Ironton, substantially all of whose stock is owned by the Pennroad Corporation, is under precisely the same control, for all practical purposes, as the Pennsylvania Railroad.

Common control was effected in these cases, however, in such a way that it is difficult to prove the fact of control to the satisfaction of the law, and this was, I think, done intentionally. In the case of the Van Sweringen companies, it was done through a maze of interlocking holding companies. In the case of the Pennroad Corporation, it was done by a voting-trust agreement. Every railroad which is controlled by the latter company was subjected, under that agreement, to the domination of certain directors of the Pennsylvania Railroad. Now, since the original establishment of the company, those voting trustees have been changed. There are three of them, and they originally were all directors of the Pennsylvania. At the present time only one is a director of the Pennsylvania. However, the other two were selected by their predecessors, who were and are all directors. The tie between these directors and the Pennsylvania Railroad, however, is not one, so far as we know, which is legally enforceable. In the eye of the law conceivably these directors might act in complete disregard of the wishes of the Pennsylvania Railroad. The eye of the law may be further confused by splitting the control among interrelated or affiliated companies or persons.

Those who drafted the explanatory provisions attached to paragraph (5) had in mind all of these various devices, and I have no doubt that they can sit down with you and expound them with the aid of diagrams representing actual instances set forth in House Report No 2789. In this connection I call your attention to the final sentence of subdivision (a) of paragraph (5), reading:

As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or management.

Under such a construction of these words it will not be necessary to prove that control or management has as yet been actively asserted. All that will be necessary will be to show that the power exists to assert or exercise control or management.

Congressman Huddleston inquired of Doctor Splawn whether paragraph (5) prohibits all stock pools or voting trusts. It prohibits them only in so far as they result in accomplishing or effectuating control or management of two or more railroads in a common interest. It should be borne in mind that the bill deals only with the matter of combining or uniting railroad companies or properties.

The new paragraph (6) contains provisions the constitutionality of which many may question. It authorizes the commission, for the "proper protection and in furtherance of the complete plan of consolidation," to investigate holdings of railroad stock, unless acquired prior to the passage of the transportation act, 1920, or

thereafter with the approval of the commission. If the commission finds that any such stockholding "is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier," it may require the divestment of such stockholding, or the voting power of such stock, "to the extent, within the time, and in the manner prescribed by the commission as necessary for the protection and furtherance of such plan." The argument in favor of the constitutionality of such a provision is exceedingly well presented in the Legal Study on Constitutional Power of Congress to Regulate Stock Ownership in Railroads Engaged in Interstate Commerce, by M. S. Breckenridge, which appears at pages 1–62, inclusive, of House Report No. 2789. I can not improve on this statement. However, because of the possible doubt in regard to the constitutionality of this provision, the new paragraph (11) contains the usual declaration that if any provision included in the bill is held invalid the remainder of the provisions shall not be affected thereby.

While I make no pretense of being a constitutional lawyer, it may be well, in view of the questions which were asked of Doctor Splawn, for me to attempt to summarize the argument in support of the constitutionality of paragraph (6), as I understand it. Such an attempt may at least serve to pave the way for future discussion.

Under the Constitution Congress is empowered to regulate commerce with foreign nations and among the several States. This power has been interpreted very broadly by the Supreme Court. Quoting from Dayton-Goose Creek Ry. *v.* United States (263 U. S. 456, 478):

> To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of these who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

After citing several cases and quoting at length from California *v.* Pacific R. R. Co., (127 U. S. 1, 39) the court went on to say:

> If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service.

The court has repeatedly reaffirmed the doctrine announced by Chief Justice Marshall in Gibbons *v.* Ogden (9 Wheat 1, 196–197), that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the rule by which commerce is to be governed," and that such power "is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

Moreover, when Congress has determined upon a rule by which interstate commerce is to be governed, the Supreme Court will not pass upon its wisdom. As was said in Northern Securities Co. *v.* United States (193 U. S. 197, 337):

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

At pages 350–351 of the same decision, the court further said:

> If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

From 1890 to 1920 it was the policy of Congress to prohibit unreasonable restraint of competition by railroads as well as in the case of other industries. The Supreme Court held that this rule, when promulgated, became operative for the future, regardless of any contracts, agreements, or combinations which had been entered into or consummated prior thereto. In United States *v.* Southern Pac. Co. (259 U. S. 214), a proceeding under the Sherman Act, it was alleged that the property of the Central Pacific had been leased to the Southern Pacific in 1885 for a period of 99 years. I call your attention to the fact that this lease purported to have been made five years before the Sherman Act became law in 1890. The court held that this lease had not been legally made. But it did not stop there; there were two strings to its bow. It went on to say, at pages 234–235:

> Moreover, it is authoritatively settled by decisions of this court that no previous contracts or combinations can prevent the application of the Sherman Act to compel the discontinuation of illegal combinations. After Congress exercises its authority to regulate interstate commerce conduct becomes illegal which has the effect of contracts, conspiracies, or combinations to restrain the freedom of interstate trade, or to monopolize the same in whole or in part. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 228. The principle has often been declared and applied in this court. It is stated, and the previous cases reviewed, in Philadelphia, Baltimore & Washington R. R. Co. *v.* Schubert (224 U. S. 603, 613, 614).
>
> We find nothing in these leases to the Southern Pacific Co. which justifies the continued control of the Central Pacific by the Southern Pacific after the Sherman Act became effective.

Quoting further from the Philadelphia, Baltimore & Washington R. R. Co. case, cited in this quotation:

> Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

If it be said that this expression referred to contract rights, I call your attention to the fact that in the Southern Pacific case the court was speaking of a property right under a 99-year lease. I also direct your attention to the fact that there is nothing retroactive in this doctrine. It looks solely to the regulation of interstate commerce for the future. Any contracts which are entered into, any combinations which are effected, any combinations which are consummated, in so far as they may affect interstate commerce, are entered into or effected or consummated in the light of and subject to the paramount and plenary power of Congress to make rules at any time by which interstate commerce shall for the future be governed.

In 1920 the policy or rule of Congress was changed. It ceased to be its rule, so far as railroads were concerned, that restraint of competition should be prohibited in all instances. Instead, Congress substituted a rule looking to and providing for the consolidation of the railway properties of the continental United States into a limited number of well-balanced and independent systems. To accomplish that purpose it provided that the bars set up by the antitrust statutes might be let down to permit such consolidations to be effectuated. This declaration of the will of Congress superseded its former declaration and will be protected and enforced by the courts in like manner. And contracts, combinations or property rights previously entered into or effectuated or acquired are no more of a bar to the effective protection or enforcement of the new policy for the future than they were in the case of the Sherman Act.

Congressman Huddleston questioned the words with which proposed paragraph (6) begins, namely:

> For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith.

I was responsible for that language, and it seemed to me essential to make it clear that all which follows, including the provisions for divestment of stock holdings, is intended and designed to protect and further the declared policy or rule of Congress for the governing of interstate commerce which was first enunciated in section 5 of the transportation act, 1920, and is maintained and continued in this bill. I will say a little more about that policy later.

In paragraph (6) the authority given to the commission in the case of stock holdings is limited to holdings acquired subsequent to the passage of the transportation act, 1920. This limitation, in my opinion, was not necessary. It seemed equitable, however, for it was on February 28, 1920, that the new policy was first enunciated in the Federal law. It is true that the consolidation plan was not finally promulgated by the commission until the year 1929, but in paragraph (2) of section 5 means were provided whereby acquisitions of control might, in the meantime, be sanctioned and protected by the approval of the commission. The proposed paragraph (6) applies only to stock holdings which have not received such approval.

It will also be noted that the commission is not authorized to compel the divestment of all stock holdings which may tend to hinder or prevent the carrying out of the plan, although this might have been done. It is only authorized to require the divestment of such holdings as may have that effect "by reason of subjecting such carrier to the control, domination, or influence of another carrier." This is

I think, an answer to Congressman Beck's suggestion that paragraph (6) is, in effect, a provision for compulsory consolidation. It does not seek to compel consolidations. All that it does is to make it possible for the commission to remove from the path of the consolidations provided for in its plan obstacles created since 1920 and without its approval, and only such obstacles as have had the effect of creating combinations or interrelations of carriers which are repugnant to the plan and tend to defeat its purpose.

Congressman Beck has further suggested that since the commission, rather than a court, is empowered to determine the facts in question and make the appropriate orders, paragraph (6) may have the effect of depriving stockholders of their day in court and hence be in violation of the due process clause. What the paragraph does is to authorize the commission in the exercise of administrative judgment, but only after notice and a public hearing, to determine a question of fact. If that question of fact is determined in the affirmative, the commission is then directed to issue an order of specified effect, in other words to execute the declared will of Congress. That Congress has power to entrust the determination of such questions of fact to the administrative judgment of the commission is well settled, and in such event the scope of court review is limited to an inquiry as to whether the commission has acted arbitrarily. One of the leading cases on this point is Procter & Gamble *v.* U. S. (225 U. S. 282).

As an illustration of the authority of this character which has been granted to the commission, paragraph (2) of the present section 5 authorizes the commission to approve an acquisition of control of one carrier by another "under such rules and regulations and for such considertion, and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises." In 158 I. C. C. 317 the commission authorized the New York Central to acquire control by lease of the properties of certain carriers, and fixed the just and reasonable terms of those leases. Certain minority stockholders appealed to the courts alleging, among other things, that the rentals thus fixed were, as a matter of law, inadequate and unreasonable. In N. Y. Central Securities Corp. *v.* United States (54 Fed. (2d) 122), a 3-judge court denied an injunction to set aside this decision, holding that on the subject of just and reasonable terms it could not substitute its own judgment for that of the commission, in the absence of reason to believe that the commission had acted arbitrarily.

It does not seem to me, therefore, that paragraph (6) could be held invalid under the due process clause. If, however, it should be felt that there is substance in this point, the procedure provided for in the Clayton Act could be substituted. Under that act, if the commission has reason to believe that any person has violated or is violating the provisions of which it has jurisdiction, it serves a complaint upon such person, and thereafter such person has a right to appear before the commission and show cause why a cease-and-desist order should not be issued. If the commission thereafter issues such an order, accompanied by a report stating its findings as to the facts, and the person does not obey that order, the commission may apply to the circuit court of appeals for its enforcement. The court is authorized to affirm, modify, or set aside the order of the commission, but the latter's findings as to the facts are conclusive, if supported by testimony.

Reference has been made to the provision of paragraph (6) directing the commission, in any order requiring a divestment of stock holdings, to "provide for a trust agreement for a limited period or for other appropriate measures for the purpose of enabling such person to realize at least the fair normal market value of such stock or other share capital." If, instead of the divestment procedure in paragraph (6), provision should be made for condemnation of the shares under the power of eminent domain, the holder would be entitled to their fair value, and the present market value would, I take it, certainly be very persuasive evidence as to that fair value. While evidence as to earning power in the future would no doubt be admissible, it might be difficult under present conditions to establish reasonable assurance of enhanced earning power in the future. In drafting paragraph (6), however, it was felt that the stockholder should in all fairness be protected against a forced sale under present market conditions. For that reason the expression "fair normal market value" was used. We all believe that the present situation is temporary and that present market values are not normal. If they persist, they may of course become normal, but the provision in the bill was intended to afford reasonable protection until the future becomes more clearly defined. I realize that it is quite possible that the wording of this provision can be improved, but I have endeavored to indicate the idea behind it.

Colonel Thom, representing the carriers generally, has voiced objection to what he terms the introduction into this bill of the general consolidation question. I have had a talk with him and I find that he particularly objects to what he regards as a reaffirmation and reemphasis of the consolidation plan idea, which he and his clients do not approve and hope will eventually be eliminated. In this respect H. R. 9059 makes no change in the existing law, which provides fully for a consolidation plan. In fact, as I have pointed out, H. R. 9059 in no way changes the essential plan and purpose of the existing law with respect to consolidations or unifications. The changes which it makes are in details with a view to perfecting the present provisions.

I have not favored the consolidation plan idea, and so expressed myself in behalf of the commission before the Senate Committee on Interstate Commerce in 1926. However, Congress has not eliminated or changed the provisions of section 5 with respect to that plan, and it is now a part of the existing law. The commission is proceeding on that basis. If the plan were to be eliminated, I should regard it as essential to the public interest that the commission should nevertheless have complete control over the matter of railroad unifications under instructions from Congress as to the general principles which should be followed in connection with such control.

So far as control by the commission over future unifications or over divestment of stock holdings is concerned, it seems to me essential from a legal standpoint that such control should be definitely linked to the announced policy and rule of Congress for the governing of interstate commerce in this respect. The consolidation plan is a central feature of that policy as it is now set forth in the law, and the provisions of H. R. 9059 are therefore linked to that policy. If the policy is hereafter changed, the provisions can be linked to the new policy. As I see it, there is no reason why H. R. 9059 should stand

in the way of a change in the policy of Congress at any time in the future. It merely takes the policy which exists and follows it.

If Colonel Thom believes that the control over the unification situation for which H. R. 9059 provides can be obtained without what he regards as an objectionable reaffirmation of the consolidation plan idea, I shall be glad to have the benefit of and to study his suggestions in that respect. In this connection I may say that I fully realize that H. R. 9059 deals with a subject which is difficult and complicated both from the legal and the practical viewpoints. It is quite probable that it can be improved. If opportunity should be given, I should be glad to review and discuss at a later date any criticisms which are offered in the course of the hearings.

I believe that the proposed paragraph (6) will greatly strengthen the hands of the commission in protecting and furthering the consummation of the complete plan of consolidation, and in securing for the new systems complete independence of management free from entangling alliances. It will be noted that in administering the provisions of the paragraph the commission is directed to take appropriate measures, through trust agreements or otherwise, to protect holders of stocks from unnecessary and unjust losses resulting from any divestment order.

I have already commented on that proposition.

Paragraph (7) on page 8 merely provides for appropriate supsension of any proceedings under the new section (5), in the event of a reopening of the plan of consolidation, until such time as it shall be determined whether or not it is to be modified, and, if so, how.

Paragraph (8) contains provisions for the legal enforcement of the section or of any orders made by the commission thereunder.

Paragraph (9) is similar in all respects to the present paragraph (3) of section 5, and paragraph (10) is similar in all respects to the present paragraph (8). Paragraph (11) I have already described.

Paragraph (12) contains a definition of the word "person" designed to reduce the amount of language used in the bill.

Section 3 of the bill merely provides for the renumbering of certain paragraphs of the existing section 5 of the act.

Now, I have one further matter I would like to discuss, and that is in response to questions asked of me at the prior hearing by Governor Shallenberger.

The holding-company operations have had the result of bringing certain railroads under common control, or under the influence of other railroads, without the approval or supervision of any public body. The question has been asked whether what they have done has been inconsistent with the public interest. This has seemed to me immaterial for present purposes. Congress has undertaken to bring the process of railroad unification under public control. Once a policy is adopted it ought to be enforced. At present there is no effective control. It is clear that unifications can be accomplished without public supervision and regardless of what the public interest may be. If there is any virtue in or need for public control the situation is dangerous and ought to be corrected. If a vital part of your automobile is found to be defective it is no argument against its repair to say that no accidents have yet occurred.

However, since the question has been asked, I shall try to answer it. In my opinion, the operations of the holding companies have been

contrary to the public interest in important respects. I can not cover the ground completely because those operations have not been completely investigated, although a good start was made in House Report No. 2789. I am also prevented from discussing the question of grouping within the eastern region because that matter has been reopened and is now pending before the commission.

I shall discuss the activities of the holding companies first from the financial viewpoint and second, from the standpoint of railroad operations. The Pennroad Corporation is so organized that its owners, the stockholders, have no voice in its management. I quote the following from House Report No. 2789, at page 632:

> Under the certificate of incorporation the directors need not be stockholders and among their powers they are to control the issuance of stock and fix the consideration therefor, and are authorized to issue obligations, secured or unsecured, without assent or vote of stockholders. Contracts or other transactions of the corporation are not to be affected by the interest of any of its directors or officers in the other parties thereto and the corporation is not required to make statements to its stockholders or otherwise of its assets or earnings except as determined by the directors.

Such few powers as stockholders have under the certificate of incorporation were surrendered for a period of 10 years to voting trustees. Under that agreement the word trustee is a misnomer. It is provided, for example, that a voting trustee—

> may contract with, or be or become pecuniarily interested directly or indirectly in any matter or transaction to which the corporation or any subsidiary or controlled or affiliated corporation may be a party, or in which it may be concerned, as fully and freely as though such voting trustee or agent were not a voting trustee or agent of the voting trustees.

House Report No. 2789 shows that 9,090,000 shares of stock without par value were issued by the Pennroad Corporation at prices ranging from $15 to $17 per share. The proceeds were $141,285,000, but underwriting fees amounting to $5,251,586 were paid to Kuhn, Loeb & Co. Whether or not that firm suffered losses in connection with the underwriting which offset these fees in part I do not know. It also received a commission of $327,397.70 in connection with the purchase of Canton Co. shares and a smaller commission in connection with the New Haven shares. Being under no accounting restraint, the capital stock was set up in the balance sheet as a liability of $90,900,000 and the remainder of the proceeds, amounting to $45,133,414 after deducting the underwriting fees, were set up as surplus paid in.

The legal theory behind the Pennroad Corporation is that it is separate and distinct from the Pennsylvania Railroad, and it is pointed out that there is now no substantial identity of the stockholders of the two companies, and that of the three voting trustees only one is now a director of the railroad. Under such a theory the Pennroad Corporation should have been managed and its investments should have been made on an equally independent basis. An analysis of its investments shows, however, that many of them could be justified, if at all, only by their possible indirect benefit to the Pennsylvania Railroad.

All of the investments were made at or near the top of the market at high prices. House Report No. 2789 shows the following prices for the principal stock holdings. I have made these computations, and I think they are right, but they are subject to check.

Boston & Maine, $122.11 per share.

That is the average for four different classes of stock—common stock and three different classes of preferred. It is impossible to determine what was paid for each of the classes.

	Per share
Canton Co	$611.28
Detroit & Ironton	100.00
Detroit, Toledo & Ironton (common)	100.00
Detroit, Toledo & Ironton (preferred)	100.00
Lehigh Valley ($50 par value)	65.00
New Haven (common)	122.76
Pittsburgh & West Virginia	170.00
Raritan River	152.34
Seaboard Air Line	11.25
National Freight	20.00

A striking example of the policy followed is the investment of more than $4,500,000 in Seaboard Air Line common stock. There was no prospect of dividends on this stock, which was all purchased after the panic of 1929 and almost on the verge of the receivership. Conceivably it might be of some advantage to the Pennsylvania Railroad to have a voice in the management of this connecting railroad, but that could be of no advantage to an independent Pennroad Corporation. The Pittsburgh & West Virginia paid dividends of 6 per cent in 1929, and 6 per cent (partly out of surplus) in 1930. An investment in its stock at $170 per share could not be justified by an independent Pennroad Corporation, but might conceivably be of advantage to the Pennsylvania Railroad in keeping this entrance to Pittsburgh out of the hands of competitors. The total invested in this road was nearly $38,000,000. The dividend records of the Boston & Maine, the New Haven, and the Detroit, Toledo & Ironton could hardly justify the amounts paid for their stock, but control or a voice in the management of all three railroads might be of indirect benefit to the Pennsylvania Railroad. The same may be said of the Canton Co., which owns a switching railroad and important terminal lands in Baltimore, and of the National Freight Co., which apparently does not pay any dividends, but may be a traffic producer for the Pennsylvania Railroad.

Summing up the situation, the Pennroad Corporation was organized under a charter such as ought to be granted to no corporation and left the stockholders without substantial control over its affairs. Part of the capital contributed by the stockholders was carried on the balance sheet as surplus. It has clearly been managed and its investments have been made in the interest of the Pennsylvania Railroad. Many of the investments were of doubtful wisdom from any point of view. They could be justified, if at all, only by reason of indirect benefits to the Pennsylvania Railroad, and in these benefits the stockholders of the Pennroad Corporation could not share unless they happened also to be stockholders of the Pennsylvania Railroad. It was, in my judgment, an unsound arrangement inconsistent with the public interest. In one respect, however, the Pennroad Corporation deserves credit. It did its financing through stock, and issued no bonds.

Mr. HUDDLESTON. May I ask a question at that point?

The CHAIRMAN. Mr. Huddleston.

Mr. HUDDLESTON. Have you any information as to who are the stockholders of the Pennroad Corporation?

Commissioner EASTMAN. I have none. The stock was offered in the first instance to the stockholders of the Pennsylvania Railroad. They were given the first opportunity to invest. I have since been told that, whether or not they invested at that time, there have been many changes in the holdings, so that there is now no substantial identity between the two. That I do not know, personally, but I think it has been stated by officers of the Pennsylvania Railroad.

Mr. HUDDLESTON. Was the stock deposited subject to the trust agreement?

Commissioner EASTMAN. Oh; yes, sir; yes.

Mr. HUDDLESTON. In other words, the Pennroad Corporation, as a corporation, disposed of its stock encumbered by this trust agreement which deprived the stockholders of their control over it.

Commissioner EASTMAN. Well, the stockholder took the stock when issued originally subject to the trust agreement.

Mr. HUDDLESTON. That is what I am asking.

Commissioner EASTMAN. That trust agreement was for a period of 10 years and was to continue, whatever transfers might be made in the shares.

Mr. HUDDLESTON. Do you know how the trust agreement was made, or how it was brought about?

Commissioner EASTMAN. The trust agreement was a part of the original set-up.

Mr. HUDDLESTON. As a part of the charter?

Commissioner EASTMAN. When the company was organized, along with the certificate of incorporation, this voting trust agreement was established, as I understand it.

Mr. HUDDLESTON. Was that included in the charter?

Commissioner EASTMAN. No; not included in the charter.

Mr. HUDDLESTON. Then, in the agreement of the original incorporators?

Commissioner EASTMAN. Well, you can find a full history of the transaction in House Report No. 2789. Whether or not it was by the original incorporators, I do not know; but I know that the trust agreement was contemporaneous with the creation of the corporation or substantially so.

The operations of the Van Sweringen holding companies are much more difficult to analyze, because of the number of them and their complicated interrelations. I shall endeavor to illustrate the situation by discussion, very largely, of the Allegheny Corporation. That company has a charter not unlike that of the Pennroad Corporation in many respects, but it was unnecessary to withdraw powers of control from the stockholders to the same extent, because of the manner in which it was financially organized. The property of the Allegheny Corporation consists largely of shares of stock of other companies. On April 30, 1930—and I may say the data I gave with respect to the Pennroad Corporation were of that same date, as shown by House Report No. 2789—that report shows that the Allegheny Corporation had an investment of $216,030,944 in stock and of only $23,886,812 in bonds. Against this investment it had bonds of its own outstanding amounting to $78,923,000 and accounts and notes payable of $18,382,659. Its stock issues accounted for $151,457,192, of which $120,499,746 was set up as a stock liability and $30,957,446 was carried as surplus paid in.

Apparently all of its securities were marketed through J. P. Morgan & Co., and House Report No. 2789 shows that that firm received commissions of $1,500,000 as compensation for services as purchaser of stock. What it made or lost in disposing of the stock and bonds to others has not been disclosed. There were two classes of stock, common and preferred. Substantially all of the voting power was lodged in the common stock, which was carried on the books as a liability of $53,745,856. The preferred was carried at $66,753,900. The investment necessary for control of the Allegheny Corporation was further reduced by the fact that a large block of its common stock was held by another holding company, the General Securities Corporation, and a large block of that company's stock was in turn held by a further holding company, called the Vaness Co.

The process of pyramiding may be illustrated by the stock of the Chesapeake & Ohio Railroad. A majority of the stock of that railroad was held on April 30, 1930, by the Chesapeake Corporation and constituted the great bulk of that holding company's assets. Against these assets it had issued $46,748,000 of its own bonds, and stock carried as a liability of $74,242,042. A majority of the stock of the Chesapeake Corporation was owned by the Alleghany Corporation, which in turn issued bonds, preferred stock largely without voting power, and common stock. A large block of Alleghany common was owned by the General Securities Corporation, and a large block of the stock of that holding company by the Vaness Co.

The purchases of the Alleghany Corporation were largely made near the top of the market at high prices. House Report No. 2789 shows, for example, that it paid $159.87 per share for Pere Marquette stock, $60 for Erie common, $130.21 for Nickel Plate common, $80.87 for Missouri Pacific common, $136.05 for Missouri Pacific preferred, and $95.19 for Kansas City Southern common. In contrast with these prices the Chesapeake & Ohio has recently purchased 46,200 shares of Pere Marquette stock from the Alleghany Corporation at $11 per share, as contrasted with the $159.87 paid, and has been given a 4-year option to purchase 215,000 shares of Erie common at $13.25 per share, as contrasted with the $60 paid.

Mr. SHALLENBERGER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. How do these holding companies earn incomes and pay dividends upon the stocks they are holding, when they invest their capital in the Chesapeake & Ohio Railway Co.; how does the Chesapeake company earn its dividends; from what source does it receive its revenue?

Commissioner EASTMAN. From dividends on the stock.

Mr. SHALLENBERGER. On the railroad stock?

Commissioner EASTMAN. On the railroad stock.

Mr. SHALLENBERGER. It divides the profits with the stockholders of the railroad?

Commissioner EASTMAN. Well, the Chesapeake Corporation is a stockholder, a very large stockholder in the Chesapeake & Ohio Railway Co. Whatever dividends are paid on the Chesapeake & Ohio stock go to the Chesapeake Corporation in so far as it holds the shares.

Mr. SHALLENBERGER. Pays to the holding company, because it is the owner of the stocks.

Commissioner EASTMAN. Not all of the stock. There are minority stockholders holding outstanding stock and they, of course, receive their dividends.

The outstanding vice, therefore, of the operations of the Van Sweringen holding companies was that having purchased at high prices mere stock equities in various railroad companies, they made these investments a basis for the issuance of bonds and preferred stock which they sold to investors, retaining control through a margin of common shares and reducing the investment necessary for such control by further pyramiding processes. The financial structure thus created was manifestly overloaded with fixed charges and a source of danger, if the earnings of the underlying railroads should be reduced by reason of changes in economic conditions. The whole set-up was, in my judgment, unsound and inconsistent with the public interest. Where such a situation is created, moreover, there is danger that it will affect unfavorably the affairs of the underlying railroads, not only because of the reflected influence upon their credit, but also because of the temptation to drain the resources of the railroads to meet the heavy load of fixed charges or preferred dividend payments.

I call your attention to the fact that these two holding companies whose structures and operations I believe to have been unsound, were sponsored by the two leading banking firms in this country. One was sponsored and its securities were marketed by Kuhn, Loeb & Co., and the other was sponsored and its securities were marketed by J. P. Morgan & Co.

I turn now to the operations of the railroads controlled by the holding companies.

Mr. MAPES. Mr. Eastman, would it interrupt you if I ask you, do you think that the provision in the charter of the Pennroad Corporation to the effect that trustees may make a contract with the company or subsidiaries of the company the same as though they were not trustees, or agents of the road, is valid or would be sustained by the courts?

Commissioner EASTMAN. I would not venture to express an opinion on that.

Mr. MAPES. Do you think that the court would sustain that?

Commissioner EASTMAN. I have not looked up that question, Mr. Mapes.

Mr. MAPES. How can a man make a valid contract with himself?

Commissioner EASTMAN. I do not know. As you probably know, I am not a lawyer. I venture to express opinions on law points which I have looked up, but on general points which I have not studied, I would not venture to express an opinion. I have not looked that question up.

So far as my knowledge goes, these railroads are well operated physically, as distinguished from financially. In some cases I have no doubt that they are better operated than before Pennsylvania or Van Sweringen control. This does not tell the whole story, however, because the seaboard ports, the interior communities, and shippers in general are greatly interested in having well-balanced competition, and in the preservation of desirable routes and channels of trade. The systems which have, in effect, been put together through the holding companies are inconsistent with the commission's consolidation plan. However, that plan has been reopened for reconsideration, so far as eastern territory other than New England is concerned. So far as it has been reopened, I shall not discuss it, except to say that the 4-system plan now proposed by the carriers is in itself inconsistent, to some extent, with the controls which have been acquired through the holding companies. Thus, it is proposed to remove the Lehigh Valley and the Pittsburgh & West Virginia from Pennsylvania domination and turn them over to the Van Sweringen system. Whether or not, if the commission refuses to sign on the dotted line and approve the 4-system plan, as proposed, the carriers will be willing to give up any controls acquired through holding-company operations remains to be determined.

There are two situations, however, outside the purview of the 4-system plan of which I wish to speak. In no part of the country, I think, has the consolidation question been more thoroughly studied by public authorities than in New England. The particular matter which has been studied is whether the New England railroads should be united, in whole or in part, with each other or should be made a part of trunk-line systems. In 1923 the New England governors' committee, composed of eminent and distinguished men, made a most comprehensive report on this subject and recommended in favor of New England consolidations. In its consolidation plan of 1929 the commission adopted this view of the matter. Nevertheless, through the holding-company device and stock purchases made without any public supervision or opportunity for the New England people to be heard in protest, the Pennsylvania Railroad has succeeded in obtaining a large voice in the affairs of both the New Haven and the Boston & Maine. Recently another New England governors' committee, composed like the former committee of eminent and distinguished men, has made a comprehensive report, and a very substantial majority of that committee has expressed itself emphatically in opposition to domination of or influence over New England lines by the Pennsylvania Railroad.

It is true that New England is not a unit on this point, and there are those who favor what they term "trunk-line penetration." There are exceedingly few, however, as far as my information goes, who favor Pennsylvania control or influence over both the New Haven and the Boston & Maine. Yet such influence has been secured without any opportunity for public supervision, and as the law now stands it could ripen into actual control, likewise without any public supervision. H. R. 9059 would place this situation wholly within public control, as it should be.

Through the Alleghany Corporation, the Van Sweringen interests have acquired a controlling interest in the Missouri Pacific system, which extends over a large part of western territory. In preparing its consolidation plan the commission found that there was little demand for systems spreading to any extent over more than one of the major territories into which the country is divided from a railroad standpoint, and very considerable demand that they should not so spread. No one advocated the union of the Missouri Pacific with an eastern system as far as I can recall, and in the plan it was made the basis of a system of its own. In the recent proceedings where the Southern Pacific was seeking to acquire control of the Cotton Belt, the Missouri Pacific itself protested against the extension of this

western system of the Southern Pacific as far as St. Louis and other upper Mississippi River crossings, notwithstanding that the brief of the Missouri Pacific bore the name of Herbert Fitzpatrick, who, as you probably know, is not only vice president of the Missouri Pacific but also vice president of the Chesapeake & Ohio and one of the leading counsel of the Van Sweringen interests. It is difficult to believe that this union of eastern and western systems can persist without complicating the entire consolidation program and stimulating a desire on the part of other eastern systems to have controlled western connections.

That completes my statement, Mr. Chairman.

The CHAIRMAN. Any question?

Mr. IGOE. Mr. Chairman, I would like to ask Mr. Eastman a question.

The CHAIRMAN. Mr. Igoe.

Mr. IGOE. Mr. Eastman, you made a speech on Government ownership of railroads, some time ago?

Commissioner EASTMAN. I have made speeches on the general subject of public ownership; they were not confied to public ownership of railroads.

Mr. IGOE. I wonder if you, at your leisure, could furnish me with a copy of that?

Commissioner EASTMAN. I shall be very glad to do so, sir.

Mr. BECK. Mr. Chairman.

The CHAIRMAN. Mr. Beck.

Mr. BECK. Mr. Eastman, you have given a very interesting summary of the doctrine of the Supreme Court in reference to the power of the Federal Government over interstate commerce, and with the general doctrine that you have announced, I have no dissent, although a portion of your statement seemed to indicate that it was in answer to something I have said.

Mr. EASTMAN. That applied to only one part.

Mr. BECK. Yes; only one part.

I quite, recognize, and, of course, we all recognize that in Gibbons *v.* Ogden there was a statement of the plenary power over interstate commerce by the Federal Government, but you also noted that it was emphasized in that opinion and Chief Justice Marshall was very careful to say that it was subject to other clauses of the Constitution, specially the great limitation of the due process of law clause. You made no reference to the Lottery case which, following Gibbons *v.* Ogden, confirmed that power. Nor Justice Harlan in his opinion in the Lottery case was very careful to say that the power of the Federal Government over interstate commerce could never be arbitrary, and, if arbitrary, the Supreme Court's intimation was that it would have no hesitation in saying that in that respect the Federal Government had gone beyond the power given to it under the Constitution.

Now, there is no doubt whatever, in my judgment, that wherever there is a combination, no matter what the form may be, whether it be buying stock, holding stock, or otherwise, to restrain commerce, or discourage competing conditions, which is another way of stating it, that the Congress has ample power to prevent it. That, of course, can not be disputed.

However, it seems to me that what you are contending for here is that irrespective of the possible destruction of competitive conditions,

and upon a much broader basis of, what is in the public interest, that the commission shall be empowered not only to say who in the future shall be a stockholder of railroads, but where such stock has been acquired which, in no possible stretch of the imagination, could convey criminal intent, as, for example, less than 1 per cent, where it is an acquisition of stock in a railroad that is not even competitive with the holding property, or where no suggestion of control was ever exercised, or ever sought to be exercised, that the commission shall be given the power upon the broad, vague, declaration that such acquisition by stockholders is against the public interest, that you can not only prevent such acquisition in the future, but that you can compel the man who has acquired an infinitesimally small amount of stock to divest himself of his holdings because the commission does not think, in the public interest, he should have it.

You take the instance you gave, of which, personally, I know very little. There were acquisitions of a small amount of stock in noncompetitive roads. Your contention is that the commission should be given the power to declare that any acquisitions from 1920 on are against the public interest without showing in any court of justice that such acquisition in any way restrains trade or is destructive of competitive conditions. That, in the last analysis, means the commission wants the power to say who shall be the stockholders of the railroads in the United States, not in futureo, but retroactively. It is, of course, the broadest claim of power of which I have any knowledge, because its implications are infinite, and it protends something, in my judgment, because it constitutes your commission of 11 men, as I have said, the judge as to who shall be the stockholders. If it applies to holding companies, it should equally apply to individuals

Your assertion of power, or claim of power, which you would want us specifically to vest in the commission carried to its last analysis, its logical conclusion, would say that an individual should not own a certain amount of stock, even though it be minute, even though the individual has owned it for the purpose of investment.

Now, the thought that I brought to the attention of the expert counsel for this committee, and to which you have given careful and able, if you will permit me to say, reply, seems to me to answer the question as to whether it is retroactive without any adjudication in a court of law; that, for instance, acquisition of less than 1 per cent in a noncompeting road, with no evidence at all of any attempt to exercise control, that the stockholder can be compelled to sell it, and you claim that that is due process of law.

I think that is a very doubtful opinion, and I think it is a thing that ought to have very careful consideration of this committee before they embark on a proposition that is so destructive of the power not only of the holding companies, but individuals, to purchase stock.

Now, you made a reference to the Southern Pacific case, and it seems to me a very apt one to illustrate how disadvantageous it is to vest in an administrative commission the power to disrupt investment holdings of the country. In the Southern Pacific case we in the Department of Justice had felt that the holding of the Central Pacific by the Southern Pacific was destructive of competitive conditions. We had a long fight, three or four years, as I recall it, and finally the Supreme Court of the United States sustained our contention and held that the holding of that Central Pacific stock was

destructive of competitive conditions, and the Southern Pacific should promptly cancel that.

The ink was hardly dry upon that solemn decree of the Supreme Court when your commission said that, notwithstanding the decision of the Supreme Court, that the stock holding was destructive of competitive conditions, that you, the commission, could say that the Southern Pacific could retain the Central Pacific anyway, and it must be admitted that you had your way, and the great constructive piece of work by the Department of Justice was made little more than waste paper, not to forget the solemn decree of the Supreme Court to the contrary.

Now, please understand me. The commission acted from the very highest of motives. I do not question that at all.

Moreover, what it did in laying down the conditions under which the Southern Pacific should retain the Central Pacific was a fine piece of constructive work, and, to that extent, the work of the Department of Justice in the Supreme Court was not wholly ineffective, although our main objective undoubtedly was destroyed by the action of the commission.

Now, let me say right there, if I could have my way, the commission's power to invalidate a decree of the Supreme Court would have gone to the Supreme Court a second time, to see whether after it had solemnly decided the question, whether any construction of the act of 1920 would justify such action by the Interstate Commerce Commission.

I only mention that, not in the offensive way. You may feel assured of that, because I regard the Interstate Commerce Commission, in many ways, as one of the ablest administrative bureaus in the world, but what does concern me is whether we shall now say that without respect to whether there is any real potential control by holding a sufficient amount of stock; without respect to the question of whether a stock holding is a noncompeting holding; without respect to the question of whether any control was in fact ever exerted or sought to be exerted, that the commission shall say to a given number of investing companies of this country, or possibly to individuals, "We do not think it is in the public interest for you to have bought that stock", bought in good faith stock which was acquired, if it were illegally acquired, could have been questioned by the Department of Justice, so that they would have had their day in court.

You shall now say if these holdings must be sacrificed, and it is small satisfaction, it seems to me, that in this order of the Interstate Commerce Commission, if we pass this law, that you say you will try to get the fair normal price; what is the fair normal price of anything, of any given railroad stock; how would you estimate it? If it simply means that you, in your discretion, would market out these stocks, amounting to hundreds of millions of dollars. You might do it very wisely. Judging from all the records of the commission, you would do it conservatively and wisely. Nevertheless, you would inflict losses upon millions of investors and to the extent of hundreds of millions of dollars. And for what? Simply because you want us to say that any holding that you think is not in the public interest shall be illegal and even retroactively so.

Now, that is going further than anything that the commission has ever asked. It is inviting this country to practically disregard property rights in the investment of stocks, as I understand it, without their day in court, and simply upon what may be the capricious judgment of the Interstate Commerce Commission as to whether it is or is not contrary to the public interest.

Commissioner EASTMAN. Mr. Chairman, there is some comment I would like to make upon what Mr. Beck has said, although I do not think he has asked me a question.

Mr. BECK. No, no; I was answering your statement, which was obviously directed to me. I would be the last to dissent to the plenary power of Congress, because I think I can say without vanity that in the Lottery case, and in the Southern Pacific case, and in the Northern Pacific case, all of which I argued, I helped to build up the doctrine of the plenary power of the Federal Government over interstate commerce, but I think there is certainly some line to be drawn where the power of the Government acting through bureaus can not disrupt the railroad organization of this country.

Commissioner EASTMAN. I have certain comments that I should like to make, and I wish I could make them in as excellent language as Congressman Beck has employed.

In the first place, as I understand it, the Sherman Act, which prohibits restraint of competition, was not an enactment of the common law, so far as the Federal Government was concerned. That is to say, any common law principles which condemned restraint of trade had no application to the railroads, so far as the Federal jurisdiction was concerned. Any restraint of interstate commerce brought about by railroads prior to the enactment of the Sherman Act was not in violation of any Federal law. The Sherman Act was merely a declaration for the future as to what the policy of the Federal Government would be with respect to regulation of the interstate commerce carried on by the railroads and other industries.

Mr. BECK. If you will pardon me right there, it did not refer to the future, because the Southern Pacific had acquired the Central Pacific before the Sherman law was enacted; in all events, it worked retroactively, because it was a great criminal statute to prevent disruption of competitive conditions.

Commissioner EASTMAN. I endeavored to point out in the statement which I made that, although the Southern Pacific had apparently secured control of the Central Pacific prior to the enactment of the Sherman Act, that act was given no retroactive application, It was applied for the future. It prevented continuance of the control for the future. It did not make unlawful what had been done in 1885, so far as the Southern Pacific was concerned; it only made unlawful and prevented for the future the continuance of that control.

The point that I am endeavoring to make is that the Sherman Act was a declaration of the policy and the will of the Congress and did not derive any particular sanctity from the fact that that policy happened to be to prevent restraint of competition.

In considering the act in the Northern Securities case, in one of the quotations which I included in my remarks this morning, the Supreme Court pointed out that there were many who did not believe that a policy of enforcing competition was wise, so far as railroads were concerned, but the court went on to say that any question as to the wisdom of the policy was not for it to determine; that

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had been passed upon by Congress and, as the court said, "that must be, for all, the end of the matter if this is to remain a Government of laws and not of men."

Now, just as Congress, in the Sherman Act, laid down the policy that there should be no restraint of interstate commerce, so it can lay down some other policy if it believes that other policy to be wise.

As I have pointed out, the fact is that is 1920 Congress did lay down another policy, and that policy looked to the unification of the railroad properties of the country into a limited number of systems under certain declared principles; and in order to bring about the unification into those systems Congress then provided that the bars of the antitrust statutes might be let down.

That is precisely what happened in the Southern Pacific—Central Pacific case, which you mentioned. The action of the commission under the act of 1920, which was not in force when the case in which you participated was tried, permitted the commission to let down the bars of the Sherman Act to the extent that it applied to those transportation systems. What the commission then did, subject to the conditions which it established by its order, was, as I recall it, quite satisfactory to the great majority of the interests who appeared in that case.

The Union Pacific, for example, was one of the chief objectors, but after the conditions were made a part of the order, it withdrew its opposition. And so far as the shippers were concerned, there were quite as many who were on the Southern Pacific's side as on the Union Pacific's side in the beginning. In the end, the Southern Pacific and the Union Pacific came together on the settlement which was finally sanctioned by the commission; and that settlement grew out of the change in policy which was made by Congress in the 1920 law.

Mr. BECK. Yes; but pardon me for a moment. Did not that act of 1920 contain the express limitation, because the commission had power, it must always preserve competitive conditions, and the Supreme Court held that the Central Pacific was directly competitive, or in a competitive condition?

Commissioner EASTMAN. It did not state it in the unqualified language which you have used. It contained language to the effect that "competition shall be preserved as fully as possible."

Mr. BECK. Well, that is right.

Commissioner EASTMAN. "As fully as possible," considering the direction to put the railroads together into a limited number of systems. Of course, it was realized that in many cases it would not be possible to put them together into a limited number of systems without doing away, to some extent, with competition which had existed theretofore. That must have been the intent; otherwise there could have been no point in giving the commission power to relieve railroads from the application of the antitrust statutes.

Now, I said, therefore, that in 1920 the policy of Congress was changed. The policy which had formerly been declared in the Sherman Act was modiffed, and the new policy set forth in the transportation act became the rule governing interstate commerce for the future.

The decisions make it clear that the new policy will be enforced and protected by the courts in the same manner as the former policy which was enunciated in the Sherman Act. That was the point that

I was trying to make in my comments on the constitutionality of paragraph (6).

Now, you have indicated that under paragraph (6) it would be in the commission's power to require divestment of the holdings of individual stockholders, whenever it might reach the conclusion that such divestment would be in the public interests——

Mr. BECK. No; I said you are arguing as to Federal constitutional power and, carried to its logical conclusions, could; I did not say that paragraph 6 did. I said that that would be its logical conclusion.

Commissioner EASTMAN. Well, at all events, paragraph (6) is not carried out to any such logical conclusion, by any means.

Mr. BECK. That is true.

Commissioner EASTMAN. Because it gives the power to order divestment only where it is found to be a fact that the holding "is, or is likely to be, the cause, in whole or in part, of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier."

That is a thing which could not be established, I believe, in the case of ordinary stock holdings by individuals. In all probability it could only be established in a case where some corporation or association or holding company had intervened as a stockholder on a comparatively large scale.

Now, as far as the day in court is concerned, I also endeavored to state that I do not believe that your criticism of this bill is valid, as I understand the decisions which have been made with respect to the power of the commission, and in cases which seem quite analogous to this. Take the case of paragraph (2) of section 5, for example, where we are authorized to determine what are reasonable and just terms under which a lease shall be made, or under which stock shall be acquired, such determination affecting the rights of individual stockholders as well as those of carriers. The law now gives the power to make that determination, and that power has been sustained by the courts. I do not believe your criticism is valid, but, if it is, then it can be met by adopting the procedure which is in the Clayton act, and I personally should not have any objection to that. That certainly gives all parties their day in court.

Mr. SHALLENBERGER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. I understand you to say, Mr. Eastman, in your opening remarks, that you were on record as being opposed to the consolidation plan of the commission.

Commissioner EASTMAN. I appeared as chairman of the commission and on behalf of the majority of the commission, in 1926, before the Committee on Interstate Commerce of the Senate, and we asked at that time to be relieved from the duty of adopting a consolidation plan, although at the same time we asked that, as a substitute for that, the commission be given complete authority over the matter of unifications, subject to principles declared for its guidance by Congress.

Mr. SHALLENBERGER. You opposed not the general idea, but the particular plan at that time?

Commissioner EASTMAN. No; I opposed the requirement that we prepare and adopt a complete consolidation plan for the future. I thought that was such an exceedingly difficult matter, to determine upon a plan covering the entire country, and which would hold regardless of changes in economic conditions. Of course, the law now gives the power to change that plan from time to time, and that is the safeguard; but in view of that safeguard, the statute is very little different from what it would be if there were no provision for any plan at all, and we were simply given complete control over the matter of unifications.

Mr. SHALLENBERGER. Do you approve of the plan that has been adopted by the commission?

Commissioner EASTMAN. I did not approve of it in all particulars, and so expressed myself at the time when adopted.

Mr. SHALLENBERGER. That is what I am trying to ascertain. Thank you.

The CHAIRMAN. Mr. Eastman, your conception of this bill is that Congress, in 1920, gave the right of consolidation to railroads and repealed certain laws that theretofore prevented consolidations; since that power is lodged in the commission, you think that power over consolidations by the commission, since it has been called upon to do this work, ought to be complete?

Commissioner EASTMAN. I do; yes, sir.

The CHAIRMAN. And you think that since the growth of the holding companies in the railroad field, and by their acquisition of one railroad after another through holding companies—I do not ask your opinion on this—but my opinion is that they have violated the spirit, if not the letter, of the statute, and that there is no law now upon the statute books to give anybody power to veto one of these acquisitions through the holding companies; that that power ought to be given to the administrative body that handles the railroads.

Commissioner EASTMAN. I believe the announced policy of the Congress is that unification or combination of railroad properties shall be under Federal control, and that as the matter now stands, it is not under effective public control. This bill is an attempt to make the control effective.

The CHAIRMAN. Any other questions anyone desires to ask Mr. Eastman?

I believe Mr. Huddleston spoke first.

Mr. HUDDLESTON. There is one point that I am not fully satisfied about, Mr. Eastman, and that is this: Just why we should stick to this date, February 28, 1920, as the date back of which we will not go? Let us assume that control of a railroad, not in the public interest, originated prior to that date; why should it be continued?

Commissioner EASTMAN. Well, I endeavored to say in my comment this morning on the bill that I do not believe it is necessary from the legal standpoint to fix that date. However, it seems to be equitable to fix it, because it was the date when the policy of Congress with respect to railroad unifications was declared for the future.

Now, I do not believe there are any stock holdings prior to that date which are likely to cause much trouble, although I may be in error in regard to that. But I know that many of the stock holdings prior to that date are quite in harmony with the commission's plan.

For example, the Southern Railway system is put together through stock holdings quite largely, but that system has been recognized in the plan of the commission, with the exception of the Mobile & Ohio. It is true that in the case of the Mobile & Ohio, the commission's plan provides for its separation from the Southern Railway system. But that matter is now pending before the commission in the Clayton Act proceeding and may perhaps be controlled there. I can not say as to that.

Mr. HUDDLESTON. That acquisition was made prior to 1920?

Commissioner EASTMAN. Oh, yes, sir.

Mr. HUDDLESTON. And if it is against the public interest and can not be dealt with under the Clayton Act, why should it be permitted to continue?

Commissioner EASTMAN. I believe that it is not necessary, from the legal standpoint, to fix that date.

Mr. HUDDLESTON. How can an equity violative of the public interest arise for the control of a common carrier? I do not question that rights may exist, rights which should be compensated for; rights which are protected by the Constitution; but when dealing with equities and not legal rights, it occurs to me to be a wrong use of the term to call it an equity if it is violative of the public interest.

Commissioner EASTMAN. I do not think equity should be allowed to conflict with public interest, certainly, although I think it might exist, nevertheless. But certainly I do not think that it ought to conflict with public interest, and if this committee feels that stock holdings prior thereto might conflict with the public interest, I should personally have no objection to that date being taken out.

Mr. HUDDLESTON. Of course, these rights which have arisen through the holding companies since 1920 are legal; they were valid when acquired; they have every equity that could be said to exist on the part of those originating prior to that date, as I see it.

Commissioner EASTMAN. It seemed to me that there was no necessity for going back beyond 1920, although I may be mistaken as to that; but that is how it appeared to me, and it also seemed that the introduction of that date would probably make the bill to some extent easier to defend.

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. I do not believe that I have anything, Mr. Chairman.

The CHAIRMAN. Mr. Beck.

Mr. BECK. No, Mr. Chairman; I do not believe I have any questions.

The CHAIRMAN. Does any other member desire to ask any questions?

We are very much obliged to you, Mr. Eastman, and we will continue at 10 o'clock to-morrow morning.

Mr. MAPES. Mr. Chairman, can the committee be called to order again?

The CHAIRMAN. Yes. The committee will come to order.

Mr. MAPES. After consultation with one or two of the members of the committee, I would like to ask Mr. Eastman this question:

Unfortunately for me, I have not been here during all of the hearings on this bill.

There was some controversy about the appropriate time for going into the consideration of this bill.

Could you put in the record, or tell briefly what the controversial points on the merits of the bill are, a summary of them, as you understand them, in addition to what you have said this morning? If you could, it would be very helpful.

Commissioner Eastman. You mean to indicate what the opposition may be, or the objections that have been made to it?

Mr. Mapes. Just what the points are that are in dispute.

Commissioner Eastman. The trouble about trying to do that is that I have not yet heard the opposition.

Mr. Mapes. I assumed that you knew what the opposition was.

Commissioner Eastman. I am not certain that I do. I have felt that there would be criticism of paragraph (6) of the bill on the ground of the possible doubt as to its constitutionality.

Mr. Mapes. The retroactive features, or features giving authority to do that for the future?

Commissioner Eastman. Authority to compel divestment of stock holdings, and I know that Colonel Thom objects to the bill because he thinks it brings in the entire consolidation question and reaffirms and reemphasizes the consolidation plan idea.

Some of the other criticisms which may be made, I think, have been voiced by Mr. Beck, although they go, I think, to the constitutional question.

Now, what other criticisms may be made, I do not know, except that it might be that some will feel that a bill of this kind might cause undue financial disturbance; that this is not a time to introduce any disturbing factors into the situation.

Mr. Mapes. Aside from that, opposition to the merits is confined pretty largely to the points you have mentioned, as far as you understand?

Commissioner Eastman. I have not had the pleasure of talking with anyone who is in opposition to this bill, with the exception of one man. He made the point that conditions ought not to be disturbed at this time, and he also made the point or rather he disagreed with me as to the interpretation of the present law. It was his view that it never had been the intention of Congress to put railroad unifications under complete public control. He had an entirely different interpretation of section 5. I thought he was wrong in regard to that, but he may appear before you and present his views. There may be many other objections that will be raised.

Mr. Mapes. Is there any opposition to the general policy of putting holding companies of railroad stocks under the jurisdiction of the Interstate Commerce Commission?

Commissioner Eastman. Well, I have not heard any opposition voiced. I have no doubt that considerable opposition may be voiced to the bill here, but I am unable to predict just what the nature of it may be.

Mr. Crosser. Just one question, Mr. Commissioner.

I would like to get your comment, not to say answer, to the objections you say that there might be a disturbance of financial conditions.

Commissioner Eastman. Well, I see no reason why this bill should result in any disturbance of financial conditions. It does not propose to take away any property from anybody without fair compensation therefor. It provides very completely for protecting that situation

through trust agreements or otherwise. Judging by what it has done in the enforcement of the Clayton Act, I think there is no reason on the part of anyone to fear that the commission will act in disregard of the rights of anyone or overlook the desirability of avoiding forced sales or anything of that kind. We have had two Clayton Act proceedings already and, while orders have been issued, the stocks have, in both cases, been placed in the hands of trustees, and are still in their hands. They have not been required to sell under present conditions.

Mr. Crosser. That is all.

The Chairman. Thank you very much, Mr. Eastman.

The committee will now stand adjourned until ten o'clock tomorrow morning.

(Thereupon, at 11.47 o'clock a. m., an adjournment was taken until 10 o'clock a. m. of the following morning, Wednesday, February 24, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

WEDNESDAY, FEBRUARY 24, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF LAWRENCE R. WILDER; FREDRIC H. FAY; AND SAMUEL SILVERMAN, CORPORATION COUNSEL, CITY OF BOSTON, APPEARING ON BEHALF OF THE CITY OF BOSTON, MASS.

The CHAIRMAN. Mr. Wilder, are you ready to proceed?

Mr. WILDER. Yes, Mr. Chairman.

The CHAIRMAN. Give your name and address and whom you represent to the committee and the reporter.

Mr. WILDER. My name is Lawrence R. Wilder, Boston, Mass.

Mr. Chairman, I represent the city of Boston. Some years ago I made a rather active investigation of the railroad situation in and about Boston and New England, and this year Mayor Curley asked me to come back to Boston to present to him and the Port Authority a report or recommendations as to what the attitude of the city should be in the consolidations of railroads.

I have never been employed by any railroad; that is, I have never received any remuneration of any kind, either in the form of money or passes or anything of that sort.

Some years ago my associates and myself acquired the New York Shipbuilding Co. That is the largest of any shipbuilding company in the world. We were then engaged in building the *Saratoga* and certain 10,000-ton cruisers and other naval vessels, but we were building no merchant tonnage whatsoever. You can not run a shipyard unless you have merchant tonnage to balance off the naval work. We inaugurated, or rather I, as executive head, inaugurated an investigation as to what was wrong with the merchant building, the American merchant marine, and I imagine we spent about half a million dollars on a very thorough investigation, both here and abroad.

That led to certain definite conclusions as to what should be done, if we were to have a merchant marine.

Those were largely embodied in what is known as the Merchant Marine Act of 1928, the Jones-White bill, which was passed that year.

As a result of that study, we concluded that the merchant marine operating problem was practically the same as the railroad operating problem. It was the employment of the right equipment and the intelligent, intensive use of that equipmet.

The North German Lloyd beat us, subsequently by building two ships such as were then proposed, the *Bremen* and the *Europa*. Those ships have mopped up the North Atlantic trade.

But, in the operation of such ships, the course and ports, and the railroad support are just as important as the ships themselves.

Now, in April of this last year, the officials of the North German Lloyd, the officials of the New England railroads, and the Boston Port Authority met in Boston and they then admitted that those two vessels, operating from Boston, could do the work of three vessels operating from New York, the difference of one-half day in each single voyage would make a 14-day turn-around possible from Boston, when 15 days was the minimum time required from New York.

The success of the German merchant marine, which is practically without subventure—that is, practically without government aid—is due almost entirely to the conjunctive service of the German railroads which reach a very large hinterland. The fastest way to ship to Constantinople is by a German ship and then a thousand-mile rail haul.

So, before any serious thing could be done to reopen the New England ports, it was obvious that there would have to be proper competitive railroad support, and it is from that angle that I have gone rather deeply into the matter.

We feel that in this bill now before you you are attempting legislation that is absolutely necessary, certainly necessary if New England is not to be dried up.

Mr. Fay, who is here with me, is the chairman of the City Planning Board of Boston, of the firm of Fay, Spofford & Thorndike, well-known engineers, and he, for some years, has studied the same problem from a totally different angle. We found, about two months ago, that our conclusions matched, and since that time we have done the work jointly.

Now, the importance of the New England territory can well be presented in a few words quoted from a publication of the United States Department of Commerce, Domestic Commerce Series No. 28, entitled "Industrial Structure of New England," published in 1930. The following are brief quotations from this publication:

> The commerce of New England depends primarily upon the activities of its mills and factories, and the concentration of manufacturing in this great industrial section gives it outstanding national importance. New England industries provide great consuming markets for raw materials and industrial equipment. The products of these industries contribute in turn an important part of the goods that enter into the commerce of the Nation * * *.
>
> Because of the lack of native raw materials, New England industries provide great consuming markets for the raw or semifinished products of other sections of the country. This region contains the principal wool market of the United States. The Nation's leading hide and leather market is located in New England. A substantial part of the American cotton crop is consumed by its textile mills. The region is important as a consumer of the ferrous and nonferrous metals.
>
> A great portion of the food consumed by its industrial population is produced in other parts of the United States. New England also has to look to outside sources for its fuel supply * * *.
>
> As an offset for the great consuming market provided to the rest of the country for raw and partially finished products, New England factories and mills contribute a high proportion of the stock of many manufactured articles consumed in other sections. With only 7 per cent of the Nation's population, the manufacturing activities of the New England States contribute 11 per cent in the national income derived from manufacturing. In a number of important lines New England contributes well over half the entire national production and there is a long list of articles in which its contribution far exceeds the share indicated by its population.

The primary source of information regarding New England is the Department of Commerce publication, Industrial Structure of New England, Domestic Series No. 28, published in 1930. The year 1927 is the latest year for which this information was found readily available in the detail given in the exhibit.

The information for the United States as a whole was obtained from the Bureau of Census publication, Census of Manufactures, covering the year 1927.

Of the 12 leading industries of New England, the cotton goods is 33.01 per cent, or one-third of the entire United States output;

Woolen goods, 61.7 per cent, and worsted goods, 69.2 per cent, these two products of the woolen industry combined amounting to two-thirds of the United States output;

Boots and shoes, 34.3 per cent, or one-third of the entire United States output;

Brass, bronze, and other nonferrous alloys and coppers, 32 per cent, or one-third of the entire United States output; and

Paper, 24.9 per cent, or one-fourth of the entire United States output.

In other words, gentlemen, the raw material, practically all of it, all of the fuel, and the great bulk of food must be hauled into New England.

The haul by rail on fuel is not less than 400 miles. Of course, by water, it is longer, and that 400-mile rail haul is about the minimum on both the raw materials and the fuel which must be brought in.

Now, the finished product must be sold outside of New England, and the markets to be reached are obviously 400 miles or more.

So that the importance of transportation to New England and the transportation cost is to my mind far more important than to any other section of this country, or any other country that I know anything about. England, which is also insular, is better off than New England, in that she has her own fuel; she produces considerable raw material and quite a bit of her food products. New England, therefore, is utterly dependent on her contact with, her ready access to, not only markets of this country but foreign markets, and more so than any other section, so that I think we can safely say that this merger means more to her and her 8,000,000 population than any other section.

Now, her ports of our country—the New England seacoast, covers about one-half the distance from Canada to the Potomac, or the eastern seaboard of the eastern territory in which these mergers are proposed. New England's ports have shorter sea hauls and this should come to her benefit, should make possible the reopening of her ports, provided that she has a rail system with a proper degree of interest in the welfare of New England.

That is not the case to-day, particularly is it not the case in these four trunk-line systems. Their principal interests are all outside of New England.

The New York Central has, as you know, the Boston & Albany under lease, but the New York Central has not spent a mill out of every dollar that is has spent in the development of the ports of New England. The Boston & Albany is a sort of thread across the State of Massachusetts. It does not contact, except in Boston, with any of the larger industrial cities, and the service rendered has been most indifferent.

We looked to the Boston & Maine this summer in a hope that, that being a purely New England railroad, it could be built up to render a service which would make possible the establishment of these various ship services out of Boston and to see if we could not get an improved service from the mid-West. We proposed a trial sailing of the *Bremen*, from Boston, and we wanted to support that with special passenger trains from Chicago, Milwaukee, St. Louis, and other points in the Mississippi Valley, where there is a large population of German origin.

That, for the first time, brought us in direct contact with the difficulties that the New England railroads face to-day. All that the Boston & Maine can get, in the expression of their executives, is the crumbs that drop from the table of the rich.

They have one passenger train, the Minute Man, but that Minute Man gets to Troy, N. Y., and it is lost. It goes to Chicago. What goes to Chicago is merely one, or possibly two, Pullman cars.

One of the executives of the Boston & Maine wanted to come back from Cleveland, and he wanted to come back on his own Minute Man. The Minute Man was due there about 2 o'clock in the morning. He found it was not even pulled into the station and he went out into one of the yards back of Cleveland and finally was able to get on the train, though if he had not been a railroad executive, I do not think he could have.

We have always felt that the only conceivable way by which the New England roads could be put on a parity with the other Class 1 systems in the eastern territory would be by increasing the port traffic.

The traffic density on the Boston & Maine, and on the New Haven is, roughly, about half, in ton-miles, per mile of road of what it is on the larger Class 1 systems outside of New England. The result is that the freight rates—that is, the rates that the consumers pay—are, in 1930 and 1931, almost twice as much. I mean, the rates within the borders of New England are almost twice the rates on the systems outside. For example, from the Interstate Commerce Commission's report for 1930, the average freight revenue per ton-mile on the Boston & Maine was 1.696¢, as against 1.008¢ of the New York Central and as against 0.975¢ on the Pennsylvania.

A diversion of 10 to 15 per cent of the export and import traffic now moving through the congested port of New York, diverted to move through New England ports, would give a sufficient additional volume of traffic to bring the traffic density about up to that of the other roads. There is not sufficient export and import business originating in New England. It must be solicited from outside.

So, during the course of this work, Mr. Fay and I became more and more curious as to what had become of the voice of New England in these proposed mergers. The system as set up by the Interstate Commerce Commission in December, 1929, allotted to, or allocated to, the New England roads under the groups of system 1 and system 2, certain lines that, from our viewpoint, were utterly essential to the Boston & Maine and the New Haven; for example, the Delaware & Hudson had ready access to the anthracite fields; the New Haven through the New York, Ontario & Western to ex-lake grain at Oswego.

Under the 4-party plan those roads were to be allocated elsewhere.

Now, some 20 years ago, when Mr. Mellon was running the New Haven, he found it absolutely essential to acquire for New England control of the New York, Ontario & Western in order that he might have his own access to the anthracite fields, the fuel which is so entirely essential to New England.

Mr. Fay and I could not understand why these roads were to be taken from us. We could not understand the merger "exclusive of New England." We could find out but little from New England railroad executives.

Now, in August, I believe in August, or early in September, Mr. George Ogden, who is a very charming gentleman, was appointed by the president of the Pennsylvania as vice president of or for New England, and he came up to live with us in Boston.

On December 29, of 1931, Mr. Fay and I called on Mr. Ogden at his office at 80 Federal Street, and we asked Mr. Ogden point blank what is the meaning, how can there be a merger in the East, "exclusive of New England." Mr. Ogden said:

> For once, we will give you a candid answer. When the heads of the four proposed systems sat down to make this great divide, it was made perfectly clear to them by General Atterbury that the Pennsylvania was dominant in New England, that it had control, or working control, of the New Haven; New York, New Naven & Hartford, through its ownership of stock, of which you are aware, and through the physical connection of the New York connecting railroad, a very important physical link; that while the Pennsylvania did not own one share of the Boston & Maine, the New York, New Haven & Hartford controlled about 28 per cent through the Boston Railroad Holding Co., and the Pennroad Corporation some 16 or 17 per cent, so that while the Pennsylvania, as such, had no ownership of the Boston & Maine, it was dominant in the Boston & Maine through its control of the New Haven, the New Haven interest in the Boston & Maine, and through the Pennroad Corporation.

Mr. Ogden went further and stated that he did not believe that the Pennroad Corporation came under the jurisdiction of or control by the Interstate Commerce Commission.

Therefore, the Pennsylvania was dominant in the two major New England roads; the roads like the Maine Central, and the Bangor & Aroostook, and the Rutland, and the Central of Vermont, which is controlled by the Canadian National, are hardly in this picture; the two principal carriers being those two I have mentioned.

Therefore, when the heads of the four proposed systems started to consider the consolidation plan which they subsequently laid before you, New England was out of it, needed no consideration, and was not to be considered, beacuse dominated by the Pennsylvania.

That, of course, was a surprising statement. It was followed by an even more surprising statement. We asked Mr. Ogden how it was that the New Haven owned and controlled New York, Ontario & Western was to be taken from us—a road which we felt essential to New England, particularly as the Welland Canal will open this year, and that road serves the port of Oswego, which is 114 miles nearer the seacoast than Buffalo, to which road the Interstate Commerce Commission has already granted a favorable differential of a cent and a half per hundred on ex-lake grain and grain products.

We felt that road was essential to New England in its ability to supply grain and grain products as bottom cargoes. It also touches the heart of the anthracite field in two places.

So, we asked Mr. Ogden how it was that New England was to be deprived of its road. Mr. Ogden said:

> Well, if you will look into the hearts of the gentlemen who have made this 4-party plan, you will find that they are not, all of them, happy. They have all had to give and take, and among other things, the New York, Ontario & Western had to be given up.

We did not think that was quite proper, because we hardly thought that was the Pennsylvania's give-up. We felt it was essential to and definitely a part of New England.

A little later we wondered why the New England railroad executives had not come forward, at least in the defense of system No. 1 and system No. 2, as set up by the commission. They were finally very frank. They said:

> Wilder, you have got us on the spot. We know that you have not intended any harm to us, but you have got us on the spot. Now, look at our position. If we come forward in a statement of desires or demands, or requests, that are not in accordance with the railroads owning control of our roads, we will be fired for insubordination. Obviously, we will be replaced by purely "yes men." We therefore feel it is better for us to do the very best we can for our roads, rather than be replaced by purely "yes men."

So we have a situation in New Enlgnad where no railroad man, that is, no railroad man of the two major systems, is in a position to speak for the necessities of New England, and if that is true in New England, it appears to me that possibly it might be true in other sections of the country.

If through these holding companies that may or may not be outside of the control of the Interstate Commerce Commission such a situation as that can be successfully set up, I personally feel it is most dangerous. I feel that the cure lies in the enactment of this bill. If you could put more teeth in that bill, I think it would be good. Personally, I do not believe in Government interference, or Government operation of business; but it does seem to me that for us in New England, we are facing a crisis that we can only look to the Government to rescue us from.

We can not do it ourselves. We are going to be isolated. We are bounded on the north by Canada, and the south and east by the Atlantic Ocean, and on the west by the Hudson, and if this 4-party plan, as it is now set up, were put in effect, New England will have no roads that extend beyond the Hudson.

It has been most interesting to watch the effect of this outside control. Mr. Atterbury made a statement a month or two ago—no, I beg your pardon—I think it was the 7th of January, here before the Interstate Commerce Commission, that the Pennsylvania did not control the New Haven, but from an exhibit that the counsel for the five New England governors placed in the hearing, a day or two ago, we find a very interesting shift in the movement through the New Haven's gateways.

Now, in the last six months of 1931, with an average decrease of movement through the gateways or about 15 per cent, the decrease in movement through the Pennsylvania gateway was but 0.52 per cent and through all other outside connections 19.01 per cent.

For example, there was a car, L. C. L. car, made up into a carload at Bedford, which formerly moved to Chicago over the Erie. One day this car was discontinued. In a few weeks it was reestablished. When it was reestablished, it moved over the Harlem River gateway, so that it would appear to us that that Pennsylvania control is already most effectually exercised.

The Boston & Maine is not permitted to solicit business in territory competitive with the New Haven, but the New Haven is permitted to solicit business in any of the Boston & Maine's territory.

If the Boston & Maine were divorced from the New Haven and from the Pennsylvania control, and if it were not to have the supporting bridge lines which the commission recommends, I do not think it would be long before the Boston & Maine were under receivership. That, of course, might be another way of the Pennsylvania acquiring control.

Now, the roads assigned by the Interstate Commerce Commission to New England, were the N. Y., Ontario & Hudson, with a mileage of 516; Delaware & Hudson, with a mileage of 882; the Lehigh & New England, with a mileage of 217; and the Lehigh & Hudson River, with a mileage of 97 miles, being 1,712 miles of railroad connecting the New England roads, with the system outside of New England, and one of which already belongs to New England.

Commissioner Eastman recommended that the Delaware, Lackawanna & Western, be not assigned or allocated in order that the New England system might have access over that line to the Buffalo and Niagara gateways.

The trouble with New England is that the Hudson River is a physical barrier, and I personally feel that in the last 50 years New England has made a great mistake in not pushing her railroad frontiers farther west. The value added by manufacture in New England represents somewhere between 17 and 20 per cent of the total of such value in the eastern territory.

If the mileage in that eastern territory were to be divided on a basis of industrial activities, which would seem at least one fair yard stick, and had the New England railroads not been gagged, their share would have been somewhere around eight to ten thousand miles of these systems that are proposed to be allocated.

On that basis she could have assembled a trunk line and put her ports on a competitive basis with her rival ports, New York, Philadelphia, Baltimore, and Norfolk.

As it stands, not only have they made no such plea, but this 1,712 miles of railway outside of New England, assigned by the commission to the New England system, is to be stripped from her. If you look at it from a map viewpoint, about 80 per cent of the population and 80 per cent of the industrial activity of New England lies within 50 miles of the seacoast; that is, a strip 50 miles down the seacoast. The cutting off of these west gateways means that the New England traffic must go into the Pennsylvania system.

The Pennsylvania made it perfectly clear that she has no interest whatsoever in developing New England ports. It is perfectly obvious. There is no reason why the Pennsylvania should haul freight beyond Philadelphia, or beyond New York, for a longer haul to New England ports, as there would be no additional freight revenue. If the Pennsylvania controls both the New York, New Haven & Hartford,

and the Boston & Maine, the Pennsylvania would have a coastwise system extending from Portland on the north to Norfolk and Hampton Roads on the south.

The waterborne traffic of New England amounts, in tons, to just about the total of the railway traffic, but its cost is much less.

Of that coastwise traffic, the largest single element is the fuel. That fuel is rail-ocean-rail.

Mr. WYANT. What percentage of fuel, used in New England, comes by water?

Mr. WILDER. I will ask Mr. Fay, if I may, what that is.

Mr. WYANT. The point is, I was thinking that it was impossible to transport fuel from Pennsylvania by rail as cheap as you can transport fuel from West Virginia and Kentucky by water and rail combined.

Mr. WILDER. You are correct. Not from Pennsylvania. From the Scranton and Wilkes-Barre field; yes, sir; but that is the anthracite field, and the great volume of steam coal comes up by that water route.

Mr. FAY. The latest available records for 11 months of 1931 show that the tidewater coal received in New England was 12,476,000 tons, and the total all rail coal received in New England was 9,875,000 tons. The all rail coal was largely anthracite. Anthracite comes mostly by rail, about 4 to 1; 4,731,000 tons came in by rail, as against 1,178,000 tons by the water route.

The movement of bituminous coal by water was 11,289,000 tons as against a rail movement of 5,132,000 tons for this 11-month period of 1931.

Mr. WYANT. The movement of much of the cotton industry to the South, has that also been affected by the rail rates to New England?

Mr. WILDER. Yes; that movement of cotton mills to the South, we think, has been largely caused by the rate structure being higher in New England than in other sections.

Mr. WYANT. And not labor conditions?

Mr. WILDER. Personally, I think they are better to-day in New England than in the South. Twenty years ago it was a different thing.

We entertain grave fears that if the Pennsylvania is allowed to control the Boston & Maine and the New Haven, and also controls to a large extent, the roads that serve Norfolk and Hampton Roads, that this rail-ocean-rail movement of fuel will become practically impossible; that is, if the Pennsylvania controls both of the rail ends.

It is doubtful if there will be a margin for the ocean movement, and they would dry up the water-borne coastwise traffic.

In the last analysis, with elimination of bridge lines, with control through holding companies, it would appear to us that the tendency would be towards a decrease rather than an increase in the traffic density on New England roads, and that the competitive rates in New England would disappear completely.

Providence, R. I., has had a very good taste of that. They are on one road only, and they have had great difficulty and they have been refused several times by the Interstate Commerce Commission relief, because of that fact; that is, a manufacturer in Providence, having to ship, we will say, an equal distance to Detroit, as a competing manufacturer in Worcester, has had to pay much higher transportation rates than the manufacturer in Worcester, Worcester having competition, whereas Providence has not.

We fear, therefore, if the Pennsylvania is allowed, through these means, to control the New England roads, the New Englander will have to go back on his abandoned farm. We do not see how industry can continue to exist.

And, we therefore pray you, as private citizens, to make it possible to bring such situation as the New England situation under the control of the Interstate Commerce Commission, rather than under the control of the chief executives of the railroads, whose personal and system interests are elsewhere.

The CHAIRMAN. Mr. Nelson, you want to ask a question?

Mr. NELSON. I understand that you represent whom?

Mr. WILDER. The mayor of Boston.

Mr. NELSON. And the port authority?

Mr. WILDER. Yes, sir.

Mr. NELSON. What was the set-up proposed by the majority of the commission appointed by the New England governors?

Mr. WILDER. They proposed here, sir, this week, and I will be glad to leave a copy of their report that was put before the Interstate Commerce Commission. They are opposed to the proposed 4-party trunk-line consolidation in eastern territory being put into effect, until the Pennsylvania interest, whether through the road itself, or the Pennsylvania Co., or the Pennroad Corporation, or otherwise, be eliminated from the Boston & Maine and the New York, New Haven & Hartford, Mr. Fay, that is correct?

Mr. FAY. Yes, sir; they are asking for elimination of the bridge lines from the 4-party plan.

Mr. SILVERMAN. That is right.

The CHAIRMAN. Mr. Fay is asking if there is anything in addition to that.

Mr. Fay, I understand, is going to state that, whatever it is.

Mr. FAY. I have been in attendance as a representative of the city of Boston and the Boston Port Authority, before the Interstate Commerce Commission hearings for the past week, and have heard the testimony presented by counsel and witnesses for the governors of the five New England States.

As Mr. Wilder has stated, the five New England governors asked for the complete elimination of the Pennsylvania Railroad control of the New Haven, and the Boston & Maine.

They also ask that the bridge lines which were allocated to systems No. 1 and No. 2 in New England by the Interstate Commerce Commission under the plan of December 29, 1929, be kept out of the 4-party consolidation plan.

The five New England governors have not presented any plan of their own for the disposition of the New England railroads, as it was

told at the start of the Interstate Commerce Commission's hearings on this party measure, I believe, that the disposition of New England roads was not before the commission.

Mr. NELSON. But the acquisition by certain of holding companies of the New Haven and the Boston & Maine is contrary to the plans put forward by the commission, and you believe contrary to the interest of New England?

Mr. FAY. Yes, sir.

The CHAIRMAN. And you feel quite confident that it will not only be to the disadvantage of New England industrially and in the general railroad transportation system, but also injurious to the business of your port?

Mr. WILDER. We believe that it is disastrous to the entire community, both from the industrial and just plain citizens' standpoint, because the citizen is so dependent for practically everything that he buys upon transportation, and a large element of cost is transportation cost. We feel that such control will increase that cost.

The point, Mr. Nelson, that particularly interested both Mr. Fay and myself in Mr. Ogden's statement was the admission of the domination of the Boston & Maine through the Pennroad Corporation and, coupled with that, the statement that in his belief the Pennroad Corporation was not under the control or jurisdiction of the Interstate Commerce Commission.

Mr. NELSON. What becomes of the New Haven and Boston & Maine if they are not included in the proposed plan?

Mr. WILDER. There is a wide divergence of views on that. The Providence and Rhode Island group have felt that the salvation of New England lay in what they call trunk-line penetration. They propose that the Boston & Maine be absorbed in the proposed Chesapeake & Ohio system.

We still see major difficulties in the way of that. .

First, there is no adequate connection, physical connection, between the Nickel Plate at Buffalo and the Boston & Maine at the Hudson River. One means, of course, would be the Erie to Binghamton, and the Delaware & Hudson from Binghamton to Mechanicsville, but that route is rather tortuous, has some rather severe grades. It requires some pusher operation.

Another that we investigated very thoroughly this summer was the Delaware, Lackawanna & Western to Binghamton, and the Delaware & Hudson. That is better, and possibly that is what was in Commissioner Eastman's mind when he recommended that the Delaware, Lackawanna & Western be kept out of the mergers in the eastern territory.

Mr. NELSON. Well, is there anything in Rhode Island's location that makes her interests different from the interests of the other New England States?

Mr. WILDER. Pardon me, sir; I did not hear that.

Mr. NELSON. Is there anything, is there any reason as regards locality or industry, or anything, that makes the interests of Rhode Island different from those of the other New England States, and leads her to take that position?

Mr. WILDER. No.

Mr. NELSON. Just a difference of opinion as to a general good?

Mr. WILDER. I think, sir, that probably in Rhode Island, it has been of much more importance in years gone by than in the balance of New England, because Rhode Island has never had any competitive roads. She has given more attention to it, given more thought to the railroad problem, than the balance of New England for that reason. She has not had the benefit of competitive rates. She has not had the benefit of competitive service. For example, the fruit service——

Mr. NELSON. Well, would you think that the result of all their thought on the part of the people of Rhode Island would result in their coming to a more intelligent decision than the rest?

Mr. WILDER. I do.

Mr. NELSON. You agree with them?

Mr. WILDER. In principle, but with one exception; in the testimony that I have had but little chance to read, which has been before you, the Chesapeake & Ohio system, while possibly the logical system with which to couple the Boston & Maine, has, to my mind, or is, fraught with some danger.

Mr. NELSON. Then, how is that just as good?

Mr. WILDER. Well, I do not know that it is.

Mr. NELSON. Why do you indorse it?

Mr. WILDER. I do not indorse it, sir.

Mr. NELSON. Why do you think that Rhode Island has a more intelligent opinion than the rest of New England, if you are afraid of that plan?

Mr. WILDER. Well, if I may differentiate that, sir, I feel with Rhode Island that we should have trunk-line service in New England.

Now, I would agree with Rhode Island——

Mr. NELSON. Would you not have under the plan proposed by the majority of the New England States? You have got to have trunk-line service.

Mr. WILDER. They do not go that far. The five governors recommended the domination of New England railroads by New England.

Mr. NELSON. You have got to have gateways to the trunk lines.

Mr. WILDER. Rhode Island and myself, sir, feel that even the gateways do not go far enough, as at present proposed. We feel that had the executives of the New England railroads been able to express their own minds they would have insisted either on having assigned to them such other systems, reaching farther west, or at least, trackage rights over such systems, and the point is, if you will permit, I will bring out that my difference with Rhode Island is this.

I do not know whether the Van Sweringens through their 36, or whatever number it is, of their various holding companies control the proposed Chesapeake & Ohio system. There have been many indications they do not, and that brings forth the point.

Mr. NELSON. You would not want them to?

Mr. WILDER. Sir?

Mr. NELSON. You do not want them to control it, as I understand?

Mr. WILDER. No. I do not want them to lose control of it.

Mr. NELSON. If they do control it, you would apprehend trouble?

Mr. WILDER. If they do control it, all right. But if, however, it has fallen into the hands of the Morgan interests, then I would not feel that it would serve New England, and I would not feel that this was a 4-party merger, but a 2-party merger.

Mr. NELSON. Does not this report gotten out last year tell who controls that road?

Mr. WILDER. Yes, sir; but the year past has been a rather strenuous one, and securities have shrunk, and guaranties have had to be met; additional securities have had to be put up as collateral. I personally feel that an investigation at this time might lead to some very interesting facts.

I can not tell who controls it. I do not know. I have no means of knowing.

Mr. NELSON. Are all of the rest of the New England States of the same opinion; do they think alike on this thing, with the exception of Rhode Island?

Mr. WILDER. In principle, I do not think either the five New England governors, or Rhode Island, or Mr. Fay and myself disagree very far. We, none of us, want the Pennsylvania to dominate the two major New England Railroads. We would, all of us, like for the control of at least the Boston & Maine to remain in New England. Rhode Island proposes to couple the Boston & Maine with the Chesapeake & Ohio. To do that, a proper physical link must be found between the Hudson River points of the Boston & Maine, and Buffalo.

The difference between Mr. Fay and myself and Rhode Island, from that point on, is merely a question, Is the Chesapeake & Ohio to be an independent system, or is it to fall under the same control that the New York Central is under, because the New York Central has never furnished adequate service in New England?

I would be with Rhode Island, if I felt that the Chesapeake & Ohio was utterly independent, but against them, if under the same control as the New York Central.

Mr. CROSSER. Who controls the New York Central?

Mr. WILDER. Morgan, so far as I know.

Mr. LONERGAN. Mr. Chairman, I would like to ask the witness a question.

The CHAIRMAN. Mr. Lonergan.

Mr. LONERGAN. Through the ownership of the Pennsylvania of the New York, New Haven & Hartford, and in turn, the New York, New Haven & Hartford of the Boston & Maine, has it not been estimated that the stock holdings of the Pennsylvania and those two roads, approximate 44 per cent?

Mr. WILDER. I think it is a little higher than that; that is, if you add the holdings of the Boston Railroad Holding Company, the medium through which the New Haven holds its stock in the Boston & Maine and the holdings of the Penroad Corporation, I believe it is about 47 per cent.

Mr. LONERGAN. The committees appointed by the five governors, all except Rhode Island, has recommended that the Pennsylvania divest itself of all holdings in excess of 10 per cent in New England railroads.

Mr. WILDER. May I ask Mr. Fay a question.

The CHAIRMAN. Yes, sir.

Mr. WILDER. Is it your impression, that in the present hearing they asked complete elimination or 10 per cent or less?

Mr. FAY. The governors report 10 per cent.

Mr. WILDER. The governors reported 10 per cent? What is it?

Mr. SILVERMAN. The governors report 10 per cent.

Mr. LONERGAN. But as yet no definite proposal has been submitted as to what should be done by way of dealing with the New England situation.

Mr. WILDER. No definite proposal, except that Mr. Fay, in concluding his testimony yesterday, requested of Commissioner Potter that these bridge lines be not allocated and that New England be given an opportunity to present to the commission what he feels is necessary.

Mr. LONERGAN. Are you in a position to state the attitude of the management of the New York, New Haven & Hartford Railroad Co. on this question?

Mr. WILDER. I am not.

Mr. LONERGAN. Do you know anybody who is, outside of the management?

Mr. WILDER. Not definitely, Mr. Lonergan, that is.

Mr. NELSON. Not anyone outside of the company, you say?

Mr. WILDER. Yes, sir.

The CHAIRMAN. Mr. Wilder, your idea is, then, that the domination of the Pennsylvania in New England, or whatever power it has there in the railroad field, was principally brought about through buying of stock by holding companies.

Mr. WILDER. Yes, sir.

The CHAIRMAN. And that that acquisition of that stock was done independently, and they did not have to ask the consent of the commission or anybody else to acquire it?

Mr. WILDER. They boast of that.

The CHAIRMAN. Your idea is that for the future, at least, if things like that are to be attempted, they ought to have the consent of some governing authority?

Mr. WILDER. Absolutely.

The CHAIRMAN. And that is the reason why you indorse this bill?

Mr. WILDER. Yes, sir.

Mr. NELSON. One more question.

The CHAIRMAN. Mr. Nelson.

Mr. NELSON. As I understand you, it is essential to an intelligent determination and decision in the New England situation to know the real owners of the Chesapeake & Ohio?

Mr. WILDER. Yes, sir. My personal feeling, Mr. Nelson, is that the present proposed 4-party plan should be held up till some form of control by the Interstate Commerce Commission can be had on these consolidation matters. That is, if holding companies or voting trusts, or, as far as I know, that may be certain blocks of New Haven and Boston & Maine stocks that are held, as we say, in street names for the accounts of the Pennsylvania. For example, a year or two ago, Mr. Hanauer, who was a very able man and then head of the Boston & Maine went to one of his directors, a stockbroker, and said, "Large blocks of Boston & Maine stocks are being bought up and I have traced it to your house. Who is buying them?"

The gentleman said, "Why Mr. Hanauer, I will be very glad to tell you. A client."

Mr. CROSSER. What?

Mr. WILDER. "A client of ours."

So, whether it is going to be holding companies, or whether it will be trustees, or whether it be any form by which one carrier controls another carrier, I think all of those, and I hope this bill will accomplish that, I think all of those should be brought under the Interstate Commerce Commission, before this 4-party proposed merger is effectuated.

I think also, gentlemen, that the private agreements between the 4-party carriers should also be a part of the record. We, as individuals, as private individuals, have no means whatsoever of getting at those things.

Mr. NELSON. What do you mean; that we should get copies of those?

Mr. WILDER. Yes, sir.

Mr. HUDDLESTON. May I ask whether they are in the files of the Interstate Commerce Commission?

Mr. WILDER. They are not.

Mr. NELSON. Has the commission called for them?

Mr. WILDER. Not that I know of, and I doubt whether it has the power to.

That is what I mean, sir, by "teeth" in this bill.

Mr. HUDDLESTON. Is that not just what they are seeking to have approved, their private agreements?

Mr. WILDER. I am not at all sure of that, sir. Their private agreements may go very much further than the application they have made for consolidation.

Mr. HUDDLESTON. You are able to say there are private agreements?

Mr. WILDER. To the best of my knowledge, there are private agreements. I can not say that I have seen them. There are, of course, outside of New England, as well as in New England, certain roads who are not happy with their allocation in these systems.

Mr. HUDDLESTON. Are these agreements in writing?

Mr. WILDER. As far as I know, they are.

Mr. CROSSER. Have you any information that you think justifies you in saying that?

Mr. WILDER. I believe I have, sir, though I have not seen them.

Mr. CROSSER. I know you say that you have not seen them.

Mr. WILDER. Yes, sir.

The CHAIRMAN. Judge Garber, you wanted to ask a question?

Mr. GARBER. Yes.

Mr. WILDER. For example, there was a trade by which the Chesapeake & Ohio gained access to the Manhattan Island by trackage over the Pennsylvania from Newark to the Pennsylvania station, granted its Lehigh Valley, access to the Pennsylvania's ocean freight terminals in Jersey City.

The consideration, I understand, for that was considerable, and it was reported to me that the consideration was that the Chesapeake & Ohio would forever keep out of New England. It is that sort of thing I would like to see in the record.

Mr HUDDLESTON. Are you a lawyer, Mr. Wilder?

Mr. WILDER. I am not. I am an engineer.

Mr. HUDDLESTON. I wanted to ask you whether that is a violation of the antitrust law.

Mr. WILDER. Well, not being a lawyer, Mr. Huddleston, I do not know how effective the Transportation Act of 1920 was in waiving the antitrust laws in these consolidations.

Mr. HUDDLESTON. It seems to be the view of many that that is an agreement in restraint of trade.

Mr. WILDER. Well, I think it is an agreement in restraint of trade by which New England roads were deprived of these bridge lines that the commission assigned to them, so that the bulk of New England traffic would all be sent to the Pennsylvania.

Mr. HUDDLESTON. What do you mean by "bridge lines?"

Mr. WILDER. Connections, sir; across the Hudson.

Mr. HUDDLESTON. At what points?

Mr. WILDER. I have a map here that will show you.

Mr. HUDDLESTON. Just name them.

The CHAIRMAN. Just name the points, Mr. Wilder.

Mr. WILDER. I have this exhibit put in by Mr. Fay yesterday.

This [indicating on map] is the bridge system; and this is the New Haven system.

The CHAIRMAN. When you say "this," Mr. Wilder, that will not mean anything on the record. Just name the points.

Mr. WILDER. The New Haven system is a line practically south of this line (the Boston & Albany), down through there [indicating on map], through the center of Massachusetts. And that is indicated on the map with a dark line.

The Boston & Maine system is largely north of the same line, and is indicated on the map by the solid line. The service of the Boston & Albany, running through Massachusetts, is indicated by a dotted line.

In reference to that, I will ask Mr. Fay to explain that map to you. Mr. Fay is better acquainted with the map than I am.

Mr. FAY. The Harlem River gateway is a dual gateway, or connection with the Pennsylvania system as indicated at or near New York on the map.

The CHAIRMAN. That is what you call the bridge line?

Mr. FAY. No; that is not a bridge line, unless you call New York Connecting Railroad a bridge line. In that sense it would be, but the New York connecting is jointly owned by the Pennsylvania and the New York, New Haven & Hartford; owned, I understand, equally by them.

That is the passenger bridge between the two systems.

The Harlem River gateway is across a ferry service between the New Haven docks on East River, and the Jersey City side. That is the way the freight is handled between them. It is a costly system.

Mr. WILDER. That is the Maybrook gateway there. There are three bridge lines which have connections with the New Haven either at Maybrook itself, or Campbell Hall. Those are the Lehigh & Hudson River, and the Lehigh & New England, both of which roads are relatively short lines running south, from Maybrook down into Pennsylvania and New Jersey territory, and also the New York, Ontario & Western, which is controlled by the New Haven. The New Haven owns a majority of the stock in the New York, Ontario & Western, which runs to the lake port of Oswego on the north, and it runs south into the anthracite coal fields at Scranton.

Those three bridge lines, the Lehigh & Hudson River, the Lehigh & New England, and the New York, Ontario & Western, all connecting

with the New Haven at its Maybrook gateway, were assigned by the Interstate Commerce Commission to the New Haven system, No. 2, in its consolidation plan of 1929.

Mr. HUDDLESTON. What disposition is made of it under the 4-party agreement?

Mr. WILDER. Under the 4-party agreement, the New York, Ontario & Western is given to the New York Central; the Lehigh & New England, and Lehigh & Hudson River, are both taken away and distributed among the four systems, the Baltimore & Ohio having one, and the others having trackage rights in common.

Now, of the bridge lines, which were allocated by the Interstate Commerce Commission to New England roads in its 1929 plan, by far the most important is the Delaware & Hudson which extends from Binghamton and the anthracite coal fields south of Scranton on the one hand, to the Albany gateway, connecting with the New York Central system at Albany, and the so-called Mechanicville gateway, which is the terminus there, and Rotterdam Junction, as well, of the Boston & Maine. The Delaware & Hudson, runs on up north, skirting the Lake Champlain's westerly shore and reaches Montreal. That, for years, has been a road which has interchanged a great deal of traffic with the Boston & Maine, one through which anthracite coal is moved into northern New England and also has been a link in the freight route between New England and western territory, and the other lines.

Mr. NELSON. What is to become of that?

Mr. FAY. Under the 4-party agreement, all four systems will have equal rights in the Delaware & Hudson. That is a joint decision to it of all of the four systems.

The commission, in its plan of 1929, allocated to system No. 1, the Boston & Maine, the Ogdensburg & Lake Champlain division of the Rutland, which is in the north portion of New York State, connecting with the Delaware & Hudson at Rouses Point, at the north end of Lake Champlain, and that road at present is an important link in the differential route, all rail route, from New England, by way of the Boston & Maine and the Rutland, to within about 25 miles of Ogdensburg, N. Y., to the northward, where interchange is made with the New York Central, and that link in the route goes on to the West, by way of the Niagara frontier, and the Michigan Central.

That division of the Rutland between Ogdensburg and Rouses Point was allocated, as I say, to the Boston & Maine by the commission. It is not in the present consolidation picture.

Mr. LONERGAN. That is connected with the Canadian National or Canadian Pacific?

Mr. WILDER. It is the Canadian National.

Mr. LONERGAN. Canadian National?

Mr. WILDER. Not the Canadian Pacific.

Mr. HOCH. Mr. Chairman.

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. I am confused by some of these statements as to the 4-party plan. The commission's plan embraced five or four.

Mr. WILDER. Five. The Wabash Seaboard is not in the present one.

Mr. CROSSER. I would like to ask Mr. Wilder a question.

The CHAIRMAN. Mr. Crosser.

Mr. CROSSER. Did you see the article in Scribner's by a man named Hughes, saying that Morgan had obtained control of the Pennsylvania Railroad?

Mr. WILDER. No; I did not, sir. I do not believe I understood your question.

Mr. CROSSER. That the Morgan interests had gotten the major interests of the Pennsylvania Railroad. That was in an article in Scribner's in February.

Mr. WILDER. I shall look that up with pleasure.

The CHAIRMAN. Any further questions of Mr. Wilder?

Judge Garber, you wanted to ask a question, I believe. You attempted a while ago to ask a question and somebody got ahead of you.

Mr. GARBER. I do not understand in just what capacity you were speaking in opposition to what you call the 4-party system.

Mr. WILDER. If I may clear that up, sir, what I referred to as the 4-party system is the application of the Baltimore & Ohio, Chesapeake & Ohio, Pennsylvania, and New York Central, as filed with the commission, I believe, on October 1, 1931, for consolidation of railroads in the eastern territory, exclusive of New England.

Mr. GARBER. That is just proposed to the Interstate Commerce Commission, is it not?

Mr. WILDER. Yes, sir; it is a proposal for consolidation; it has not been approved or adopted by the commission. The commission held the hearings on it, as far as I know, sir, on January 7 to 9, 1932, inclusive, and again held hearings on February 15.

Mr. WILDER. Yes, sir; it is not a system; it has not been approved or adopted by the commission. The commission opened hearings on it, as far as I know, sir, on January 7 to 9, inclusive, and again opened hearings on February 15.

Mr. GARBER. Your personal objection, as I gather it, is because it does not afford New England an outlet into the mid-West.

Mr. WILDER. We feel, sir, it isolates New England; that it cuts New England off from the balance of the country. There is a map illustrating that in the exhibit. New England becomes almost insular.

Mr. GARBER. Well, if the natural flow of commerce were permitted without restraint of the holding companies, what would be the natural economic system there?

Mr. WILDER. A system, an east and west system, between the New England ports and the important points in the Mississippi Valley, and the intermediate country.

Mr. GARBER. Well, what system would connect up, taking it on in the West?

Mr. WILDER. The ideal system would be the Boston & Maine, which has the straightest and lowest grade route, because of the Hoosac Tunnel to Rotterdam Junction; the West Shore Railroad from Rotterdam Junction to Buffalo, and from Buffalo connecting with the Grand Trunk, which is the short and water-level line into Detroit area, also into Chicago; and the Nickel Plate south of the Lakes to Chicago and St. Louis. That would constitute a system on an average about 25 miles shorter than the present New York Central system.

Mr. GARBER. And, your complaint is, because, in your judgment, the holding companies are preventing the erection of a system that

would accommodate the natural flow of commerce to the mid-West; is that it?

Mr. WILDER. Yes, sir; I am complaining, really, on three things; through use of the holding companies, the vice president of the Pennsylvania stated to Mr. Fay and myself, without equivocation, that the Pennsylvania Railroad, was dominant in New England.

Now, a flow from northeast New England southwest to the Harlem Gateway is not, and should not be the major purpose of the New England railroads. It should be east and west, because, as we see it, the only chance of bringing traffic density up and hence, traffic rates, down to a parity with those enjoyed by the industrial competitors of New England, located outside of New England, is by increasing the flow of business through New England ports.

If the two major ports of New England are dominated by the Pennsylvania, there is no means on earth by which you can build up additional business through New England ports, in spite of their geographic advantage, because no system, Pennsylvania or other, will haul goods for export or import beyond the major ports on their own systems for a longer haul, and no increase in revenues, to ports in which they are not particularly interested, and General Atterbury is on record to the effect that he had no interest in developing the Port of Boston, the major port of New England.

The second complaint is because of the foreign ownership of the New England roads through the holding companies. It has gagged, had the effect of gagging, silencing the New England railroad executives, and they have not been in a position to ask or demand or pray for New England what they think is absolutely essential to her future industrial development and welfare.

Mr. GARBER. Where is New England's greatest market when they have the purchasing power?

Mr. WILDER. Practically all over the balance of the country, but the Mississippi Valley taken as a whole, and that great mid-West territory is, of course, the largest consumer of her products. Cotton, wool, boots, shoes, and things of that sort, they go into every home. Electric machinery—the General Electric has a very large plant in New England. They manufacture household applicances of all sorts.

Mr. GARBER. What is your relation to the shipping interests there? I did not get your representative capacity.

Mr. WILDER. I resigned as head of the New York Shipbuilding Co., and I came here in January, 1928.

Mr. GARBER. What company?

Mr. WILDER. The New York Shipbuilding Co. in Camden, N. J., when I came here in January, 1928, to aid, if possible in the enactment of the merchant marine bill. Since then, I have acted purely in an individual capacity. We have felt that if we are going to have a successful merchant marine, that it will have to be founded on the New England ports, and that it can not be founded on the New England ports, unless we have adequate support of the railroads.

Mr. GARBER. I understood you to say that the merchant marine was subject to the same control as to conditions, as the railroads. In what respect?

Mr. WILDER. I do not think that that is so.

In 1925, sir, when I became the chief executive of that company, there was not one single merchant ship being built in this country, nor had any been built since the close of the war, and we therefore started an investigation as to the reasons for that, and I stated, sir, I believe, that investigation led to the conclusion that a successful solution of the American merchant marine probably contained identical elements of success of railroad operation.

Mr. GARBER. It does not have reference to the merchant marine being controlled by holding companies, or consolidations similar to the conditions as to the railroads of which you complain?

Mr. WILDER. No, sir.

Mr. GARBER. That is all.

Mr. NELSON. There is one more thing. I ought to know this, but I do not. Does this 4-party plan, now in hearing, contemplate the taking over of the New Haven and the Boston & Maine in reality, or simply leave them controlled, as they may be, by a holding company?

Mr. WILDER. As put forward, the 4-party proposition is exclusive of New England.

Mr. NELSON. It takes in neither the New Haven nor the Boston & Maine, as you have already stated.

Mr. WILDER. Yes, sir. It leaves them out.

Mr. NELSON. That is right?

Mr. WILDER. Yes, sir; and I can only explain it by what Mr. Ogden gives as the reasons for their exclusion, that is, because of the fact that the Pennsylvania through their various means was dominant in New England.

Mr. SHALLENBERGER. Mr. Chairman.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER: I understood you to say that Rhode Island did not get better freight rates, because they only had one railroad; is that true?

Mr. WILDER. That is true.

Mr. SHALLENBERGER. That is true?

Mr. WILDER. That is based on competitive rates.

Mr. SHALLENBERGER. The Interstate Commerce Commission can correct that, can they not?

Mr. WILDER. Apparently not.

I refer here to a statement made by the representatives, particularly Mr. Clemens France, of the Providence Chamber of Commerce, in which he referred to several cases in which in Providence the Interstate Commerce Commission could not relieve the shipper and he had to be relieved by private agreement.

The CHAIRMAN. Mr. Wilder, you appear here, I think you told me yesterday, as an individual.

Mr. WILDER. As an individual.

The CHAIRMAN. To express your views on this bill out of experience with these matters?

Mr. WILDER. Yes, sir, and——

Mr. Silverman, who is corporation counsel of Boston, would like to be heard for a few minutes, Mr. Chairman.

STATEMENT OF SAMUEL SILVERMAN, CORPORATION COUNSEL, CITY OF BOSTON

The CHAIRMAN. State your name and connection.

Mr. SILVERMAN. Samuel Silverman, corporation counsel, city of Boston.

I appear here representing the city of Boston, and also incidentally I am counsel for the Boston port authority.

The CHAIRMAN. Mr. Silverman, may I ask you, is your position an appointive one, or elective?

Mr. SILVERMAN. An appointive one.

The CHAIRMAN. By whom?

Mr. SILVERMAN. By the mayor of Boston, and elected counsel of the Boston port authority by that tribunal.

My position as corporation counsel does not necessarily carry with it the position as counsel of the port authority. They have a right to select their own counsel, but voted that I act as counsel for them without compensation.

Mr. Chairman and gentlemen of the committee, I appreciate very much this opportunity to speak to you. I had not planned to address the committee. I have been in attendance before the chairman and an examiner of the Interstate Commerce Commission in connection with the 4-party mergers that are now going on.

And while in attendance at that hearing, I was given a copy of the bill that I believe now is before you for consideration, H. R. 9059, and, being very much interested in that bill as it affects the section of New England, I welcome this opportunity to speak for the city of Boston and for the port authority so that the committee may have the views of the city of Boston in regard to this.

May I say at the outset, the Boston port authority is a tribunal created by the Massachusetts legislature, the members of which are appointed, two by the governor and three by the mayor of Boston. It is a quasi-State tribunal. It reports to the legislature and his excellency the governor, as well as to the mayor of Boston, and its authority is confined to matters pertaining to the port of Boston, the development of the port, its interests in all rate cases, and all matters that vitally affect the well being of the port of Boston and incidentally the Commonwealth of Massachusetts.

When this bill was called to my attention, and after I had examined it, I decided that it was in full accord with what we in Boston feel ought to be done by the Congress of the United States.

May I say that if Mr. Wilder has not already said it, because I was not here when he started, that as far as New England is concerned, we find ourselves in a hopeless situation, with special reference to the future of New England. We are at the present time in a stranglehold, as I have described it, repeatedly, to the Massachusetts legislature, a stranglehold by the Pennsylvania Railroad, in that her domination does not permit a free hand in the solution of the New England railroad situation.

In other words, no matter what we may desire in New England, that desire is handicapped and limited by the present control by the Pennsylvania Railroad of the New Haven and the Boston & Maine.

I asked President Crowley, of the New York Central, while he was on the witness stand this question, would he leave the destiny of

New England to the New England people with reference to the railroad situation, and he said, "Yes," and I asked him further than that, if the people of New England were desirous of having the Pennsylvania divorced of its control of the New Haven and thereby the control of the Boston & Maine, would he allow the people of New England to have their say in that matter, and his answer was evasive, as I expected, because of the embarrassing position he found himself in, and it was, "I leave that to the New England people." And then I said to him, "But, if the New England people have, as loudly as they possibly could, said that they wanted to be free of Pennsylvania control, would you agree with what the New England people said?" and his answer was, "I still leave it to the New England people."

And he made no direct reply, and I thought that was typical of our situation, namely, that we know what we want done with reference to the Pennsylvania Railroad, but we are unable to get it.

Now, it is idle and futile, it seems to me, for New England to try to determine what is best for her with reference to her own railroads, when you have the Pennsylvania control of the situation, and any move that you make must always take into consideration that hold that the Pennsylvania has upon her.

Before the present chairman of the Interstate Commerce Commission we were unable and not desirous of presenting a New England plan, and the obvious reason is that we can not present a New England plan definitely, unless the Pennsylvania is out of the picture. If the Pennsylvania continues to control the New Haven and Boston & Maine, then we can not present a definite plan, because that plan must always be subordinate to the Pennsylvania control.

Now, there are definite ideas in New England as to what is best for New England.

It is true some have one idea and others have another, but we can not get together and there is no sense of getting together until we get rid of the Pennsylvania situation.

Now, this bill, as I take it, Mr. Chairman and gentlemen, is to get rid of the subterfuge that is now in existence with reference not only to New England, but other parts of the country. I think everybody sees through the phantasy and the farce of the present situation, whereby a holding company, like the Pennroad Corporation, can acquire control for the mother company, the railroad company, and, in substance, get around the Interstate Commerce Commission's power of regulation and control, and, to some extent, get around the antitrust laws.

Now, everybody knows it is a subterfuge. General Atterbury and the president of the road can screech as loud and long as they want to. Everybody knows that the entire fabric of the character of these holding companies, the Pennroad Corporation, and the Alleghany, and all of the others, is merely a subterfuge for getting around the power the Interstate Commerce Commission would exercise if these companies were not holding companies, and I approve of this bill which reaches, as I understand it—and if I understand it correctly—these holding companies, and gives the Interstate Commerce Commission the power, I believe it wants, namely, the right to see through the whole picture and eliminate such subterfuges and tackle the whole problem. In other words, not consider the Pennroad as a private institution, similar to a commercial institution, but consider it

as an adjunct of the railroad company which it really is; consider these holding companies as on the same basis as the common carriers, since that is what they are, in substance.

Now, I have heard it said, well, you do not want to turn over the business of the entire country to the regulation of the Interstate Commerce Commission, and I do not want to go that far, of course. I do not think that is or was the purpose of the creation of the Interstate Commerce Commission, but the basic reason for the creation of the Interstate Commerce Commission was to regulate interstate commerce. That was the purpose of the creation of the commission in the early 1870's——

The CHAIRMAN. 1880's.

Mr. SILVERMAN. That was the fundamental purpose. It was recognized that the interstate commerce of this country had to be regulated, and had to be governed by a Federal tribunal, and we wanted to give to this commission and we hoped we had, full power to regulate the commerce, interstate, of the country.

Now, it is quite apparent that this new idea of the holding company, like the Pennroad Corporation, is merely a subterfuge to take away from that commission the right to regulate the acts of the railroads, and this bill, if I understand it correctly, is to get at that very evil, to permit the Interstate Commerce Commission, if in its wisdom and judgment it believes a company like the Pennroad Corporation is thwarting the power of Congress and the intent of Congress and the intent of the people of this country, that by this means the Interstate Commerce Commission can gain control and regulate that situation.

Mr. HOCH. Mr. Chairman.

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. You stated that the holding company was a device that permitted the railroads to get around the commission and, to some extent, the antitrust laws.

As I understand, the transportation act removes the barrier of the antitrust laws only in cases of unifications approved by the commission.

If that is true, how can they get around the antitrust laws by this device?

Mr. SILVERMAN. Well, if you have a private organization like the Pennroad, or a holding company, and it is not recognized as a common carrier, and it has, in substance, as far as the commission is concerned, no direct relation to interstate commerce, because it is a private institution, the Pennroad Corporation, by acquiring control of railroads, could eliminate competition. It can regulate the companies, aside from the Interstate Commerce Commission's regulation, and it can, in substance, do just what the antitrust laws, it was hoped, would not permit to be done.

In other words, in the same position as a private organization controlling companies, it could eliminate competition in restraint of trade and do almost everything that a private organization might do, until it ran afoul of the proper tribunal, like the Federal Trade Commission, or another tribunal.

It seems to me unless the Interstate Commerce Commission has power to regulate that company, if, in its opinion, it is an agency of the railroad company, or common carrier, that the sky is the limit.

Mr. HOCH. I am not raising any question as to that.

Mr. SILVERMAN. No.

Mr. HOCH. I am not raising any question as to that power. I am raising the question of whether the antitrust laws would govern.

Mr. SILVERMAN. I do not know whether, under the present law, the Interstate Commerce Commission could get at the holding company, or inquire into that situation, unless Congress passes such a law as this.

Mr. HOCH. I am not raising the question as to whether the Interstate Commerce Commission can get at it, but whether the Government can get it for a violation of the antitrust laws.

Mr. SILVERMAN. The trouble with that is the other side of the picture, Mr. Congressman, which is this: Here you have an inanimate organization, the Pennroad Co., that really is not doing anything but holding stock or owning stock. You have not got an organization that is actively engaged in business. You have a corporation that is merely an owner of stock.

Mr. HOCH. It is readily to be seen how the proof might be more difficult, in a case involving violation of the antitrust laws if the corporation is not engaged directly in transportation

Mr. SILVERMAN. I think that they could, if you can establish your proof, by referring to the Federal Trade Commission or any other organization that has authority over combinations in restraint of trade, but here you have an organization that merely owns stocks. I suppose that the Pennroad has not got a single individual out soliciting business, or anything of that sort, so there would not be anybody to get, and, as I say, if you are going to permit the Interstate Commerce Commission to regulate interstate commerce, then give them teeth whereby they may do it.

Now, in New England——

Mr. GARBER. Right there, may I interrupt you?

Mr. SILVERMAN. Yes, sir.

The CHAIRMAN. Judge Garber.

Mr. GARBER. Is not the acquisition of control an aggressive act equivalent to the action of the individual going out and destroying competition?

Mr. SILVERMAN. I think, as I replied to the gentleman on this side (Mr. Hoch), that you might be able to go over, and go after the Pennroad, if you can establish a violation of the antitrust laws, but you have an awful job to establish your case, bringing in any proof, because you are dealing with perhaps, in the case of the Pennroad, one individual, as I have been led to understand with reference to the Pennroad Co., there is a certificate—this is merely hearsay—there is a certificate in the safe of General Atterbury whereby he controls the whole situation.

He has got one certificate, so I have been told—this is only imaginary—he has got a certificate in his safe that controls the whole situation, and how you are going to prove these things I do not know.

Mr. GILLEN. Mr. Chairman.

The CHAIRMAN. Mr. Gillen.

Mr. GILLEN. You seem to want to break the hold of the Pennsylvania system in New England. What are your reasons?

Mr. SILVERMAN. I was just going to come to that.

The CHAIRMAN. You just have about three minutes.

Mr. SILVERMAN. I have got to talk fast, for I have got to cover a big field.

In New England, we believe that the Pennsylvania control has not been conducive to the best interests of the commerce and competitive conditions in New England. We believe that the Pennsylvania is not friendly to New England. On every occasion where an opportunity has been given where they could exert friendship, it has not been shown as a noticeable fact.

I think General Atterbury, on the witness stand, only a short time ago, in this present hearing, indicated that he was not interested in the welfare of New England, so we have nothing to gain in New England, and everything to lose, by having outside interests control our railroad situation and deprive us naturally of the right to have our territory built up, which the Pennsylvania is not interested in. The Pennsylvania is interested in Philadelphia and New York, and they are not interested in Boston. We know that, and they have practically admitted it. We want to get rid of them. We believe we ought to have a free hand in New England. Then, if the New Haven, after it is divorced from the Pennsylvania, is to tie up by some relationship with the Pennsylvania, all right. The Boston & Albany is now tied up with the New York Central through a lease that has legislative sanction in Massachusetts. If the Boston & Maine, having been divorced from the Pennsylvania, can receive trackage rights over the West Shore into Buffalo and to the west, then we have got three railroads in New England stretching out and tying up with the rest of the country.

We do not approve of the trunk-line penetration whereby these trunk lines can come in and stifle competition. We want our own roads independent, each one standing on its own bottom and stretching out and tying up with other lines outside of New England. We believe this way that we will have more competition and we will have more business and there will be a greater prosperity in New England. That is our plan. We can not accomplish that, or accomplish any plan, as long as the Pennsylvania has us by the throat, and ties up the New Haven and the Boston & Maine.

The CHAIRMAN. You think, then, Mr. Silverman, before, even though it was in the public interest that some railroads own an interest in other railroads—before that is allowed, that you should be given an opportunity to be heard, both sides, and that it should be passed upon by a body like the Interstate Commerce Commission as to whether or not it is in the public interest?

Mr. SILVERMAN. Yes, sir; we believe that the Interstate Commerce Commission ought to hear New England before it makes any decision on the 4-party plan; that it ought to give New England an opportunity by divorcing the Pennsylvania from its present control before it makes any decision on the 4-party plan.

The CHAIRMAN. We are very much obliged to you, Mr. Silverman.

If the committee will remain, we will have a short executive session. Mr. Burtness has something that he wants to bring up.

And the committee, when it adjourns for the day, will adjourn until Tuesday, as Colonel Thom will be the next witness, and he is tied up before another committee for to-morrow and probably next day.

So we will now adjourn until 10 o'clock Tuesday morning.

(Thereupon, at 11.45 o'clock p. m., the committee adjourned to meet Tuesday, March 1, 1932, at 10 o'clock a. m.)

REGULATION OF RAILROAD HOLDING COMPANIES

TUESDAY, MARCH 1, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

Mr. BECK. Mr. Chairman, before the witness commences, could I bring a matter to the attention of the committee which seems to me of some importance.

The CHAIRMAN. Yes. This is not anything that should come up in executive session?

Mr. BECK. No; I do not think so.

I imagine that all of the members of the committee attach a great deal of value to whether the Interstate Commerce Commission is or is not favoring this bill. I got the impression from Commissioner Eastman, perhaps erroneously, that while the Interstate Commerce Commission has never in any formal way approved the bill now under consideration by our committee, yet that the legislative committee was the appropriate organ for the expression of the views of the commission, and that his views, therefore, did have some official status. I do not know whether I overestimated what he said, but I think many of us got the impression that it was at least semiofficial, the views expressed by Commissioner Eastman.

Now, I notice in the New York Times of February 28, on a hearing on the preceding day, presided over by the chairman of the commission, Mr. H. T. Newcomb, counsel opposing the plan of consolidation offered in evidence the statement made before this committee by Commissioner Eastman. According to this statement in the New York Times, February 28, the chairman of the commission ruled out the statement of Commissioner Eastman on the ground—now, I quote from the New York Times—

> that it was not an official document, and also, because it represented the opinion of an individual member of the commission. Mr. Newcomb had argued that Mr. Eastman had spoken before the House committee as chairman of the commission's legislative committee and to all intents and purposes he was therefore "the commission."

I think it would be valuable to us all, because while the views of the Interstate Commerce Commission are not conclusive on us, yet, obviously, we are nevertheless interested, and they are impressive, and I would like to ascertain whether it is correct that Mr. Eastman's statement was excluded from the consolidation hearing on the ground that it was an expression of his individual opinion and not the opinion of the Interstate Commerce Commission.

The CHAIRMAN. I might state, Judge Beck, that if you will read recommendation No. 9 of the Interstate Commerce Commission, you will find that the commission, without dissent, does recommend that the acquisition of railroads by holding companies, be placed under the jurisdiction of the Interstate Commerce Commission, which is an action of the whole commission. If you will read recommendation No. 9 in their annual report for 1931.

Mr. BECK. Is that the one, Mr. Chairman, where the commission rather tentatively admitted that it might be desirable; is that the one to which you refer?

The CHAIRMAN. This says, recommendation No. 9:

9. That section 5(2) of the interstate commerce act be amended so as to bring within the jurisdiction of the commission for approval or disapproval any acquisition of the control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding company or otherwise.

That is unequivocable.

Mr. BECK. Yes; that is very true, but, of course, that is not committing the commission upon the details of the present bill.

The CHAIRMAN. I shall undertake, before these hearings are printed, to have an expression of the commission as a whole on this bill.

STATEMENT OF R. C. FULBRIGHT, CHAIRMAN LEGISLATIVE COMMITTEE, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, HOUSTON, TEX.

Mr. FULBRIGHT. My name is R. C. Fulbright. I am chairman of the legislative committee of the National Industrial TrafficLeague, and as such appear here in behalf of that organization. It is not necessary to state further for the record what the organization is, as that has been dealt with in detail before the committee in their hearings on section 15a.

I shall not undertake to go into a discussion of the detailed provisions of the bill. The league, as such, has not considered this particular bill. It has, for many years, considered the general subject of railroad consolidations and it has announced its belief in certain principles or doctrines which affect this proposed legislation. I have a short statement that I would like to read into the record, which will express the views of the league.

The National Industrial Traffic League is opposed to any legislation which is designed to bring about compulsory consolidation of railroads. It believes, however, that no unification or consolidation of different railroads engaged in interstate commerce should be permitted without first obtaining approval of the Interstate Commerce Commission, and to this end has advocated legislation which will protect the jurisdiction of the commission in this respect. When your committee was considering railroad consolidation legislation in 1928 the league went on record as opposing direct or indirect unification of railroads without the consent of the commission and its postition in this respect has not been changed.

At the last annual meeting of the league in November, 1931, it went on record by unanimous vote as opposing legislation which would permit holding companies to acquire control of two or more railroads without consent of the commission or which would permit an indirect acquisition of control of two or more roads by common interests through any device unless the action had been approved by that body. It therefore follows that the league is in favor of the primary purpose of H. R. 9059 now being considered by your committee.

References in the proposed bill to the plan for consolidation of all of the railroads of the country into a limited number of systems makes it necessary to explain more fully the attitude of the organization toward this subject. Not only has the league opposed laws designed to bring about a compulsory consolidation of railroads but it has likewise opposed the provisions of the existing law for a consolidation plan to include all of the railroads of the country.

Criticism has also been made of other provisions of the existing law with respect to consolidations and the league has advocated legislation under which voluntary consolidation may be authorized provided the commission after notice and hearing shall find that existing carrier competition will be substantially preserved and that the proposed consolidation will be otherwise in the public interest. The views of the league on the subject were presented in some detail to this committee at the first session of the Seventieth Congress in January, 1928, when the committee had under consideration H. R. 5641 introduced by Hon. James S. Parker, then chairman of this committee. That bill proposed to do away with the so-called consolidation plan, but it contained a proposed declaration of policy by Congress in favor of consolidations. The league opposed any affirmative declaration of such policy and also insisted that the bill should contain a provision to the effect that the commission could authorize a proposed unification where it finds that it is in the public interest and that it will not substantially reduce existing carrier competition. We also pointed out various ways in which the existing law was unsatisfactory and expressed our approval of a more complete provision of legislative machinery for bringing about such unifications when they were found to meet the requirements as to public interest and preservation of competition.

Since there has been no change in the position of the League it seems appropriate at this time to say to your committee that the references in H. R. 9095 to the consolidation plan and to the various provisions of the existing law should not be considered as a legislative approval of the existing law on the subject. We shall assume that H. R. 9059 is designed simply to strengthen the existing law so as to prohibit the defeat of the general policy of commission regulation of consolidations through the indirect acquisition of control through holding companies or similar devices, and that the subject of consolidation legislation will still be before Congress for further consideration when your committees can find time to consider it. In other words, it is our desire to make it clear to the committee that in approving the general plan and purpose of the existing bill we wish to make it clear that we are not approving the so-called consolidatition plan and that we have not receded from our advocacy of revised consolidation legislation along the lines we have heretofore indicated.

The CHAIRMAN. In reading the bill that is immediately before us you do not think that it attempts to do more than to enact legislation

to do the thing that we hope to do, and that it is not going into the general question of the revision of the consolidation act of 1920?

Mr. FULBRIGHT. My first impression of the bill was otherwise, but as I have studied it further in connection with the existing law, I came to the conclusion that it was of a corrective nature.

The CHAIRMAN. It is entirely necessary that we refer to the consolidation provisions in order to amend it, and that is as far as the author of the bill had any intention of going.

Mr. FULBRIGHT. Following the hearings in 1928, your committee reported out H. R. 12620 on April 13, 1928, in which substantially all of the changes sought by the league were incorporated. It prohibited a direct or indirect acquisition of control or interest in the properties of one carrier by another and it dispensed with the consolidation plan and the declaration of congressional policy favoring consolidations, except a requirement that the commission should give due consideration to the inclusion of short and weak carriers in any territory involved in a consolidation petition being considered by it. It authorized the commission to impose conditions making provision for such short lines. In no other respect was there anything in the bill that even hinted of compulsory consolidation. It also provided that the commission should give due consideration to the maintenance of competition between carriers and to the prevention of undue lessening of existing competition. While the language of the bill with respect to competition was not as strong as we advocated, nevertheless, we accepted the measure and advocated its passage through the House and later supported it in the Senate. Both the majority and minority reports of this committee on H. R. 12620 condemned the so-called consolidation plan. The minority favored stronger language to preserve existing competition; which was in accordance with what the league was then seeking. Since both minority and majority seemed to favor voluntary consolidations under appropriate restrictions we believe it proper at this time to request this committee to reserve for future consideration the general subject of consolidation legislation whatever may be the report of the committee on the subject of holding companies.

I might add, in that connection, that in the report of this committee on the Parker consolidation bill, H. R. 12620, in April, 1928, both the majority and the minority agreed that the existing law was not satisfactory; that the so-called consolidation plan was not a wise provision. Both agreed that some legislation should be had. There was some disagreement as to the scope to which Congress should at that time go. The minority favored strong language to compel the preservation of carrier competition. The minority felt that some expressions of the bill submitted by the majority would be interpreted to mean that the Government affirmatively favored the consolidation of railroads.

Now, of course, if those criticisms of the minority were warranted I may say that those criticisms were along the line of what the league adopted. I wanted to make this statement about it.

The CHAIRMAN. You mean that is what the minority of this committee said when the Parker bill was reported to facilitate consolidation, about two years ago.

Mr. FULBRIGHT. Yes, sir; three years ago.

Mr. HOCH. Mr. Chairman.

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. You recognize, I take it, there is a somewhat different situation now with reference to the general plan from what existed at the time the committee made its report.

As I recall the situation at that time, the committee had before it repeated recommendations of the commission that it be relieved from the necessity of promulgating a general plan, the commission stating that it was not practicable to promulgate such a plan.

Since that time the commission has promulgated a plan, and applications are now before the commission for a modification of the plan.

That, of course, does not go exactly to the merits of the question, but does make a rather different situation confronting the committee now.

Mr. FULBRIGHT. I agree with you. Of course, it has not in any manner affected our attitude toward the legislation which provides for a plan.

We still are opposed to the plan, but the commission has actually adopted the plan.

Mr. HOCH. They said that they could not, but now they have.

Mr. FULBRIGHT. Under the law which they now have, subject to their right to modify, as the law provides.

Now, I can not see how you can graft this legislation very well without referring to the plan, but I want it understood that we have not changed our attitude on the matter in any manner.

I would like to add, Mr. Chairman, that the provisions of this bill in section 6 for machinery by which a stockholder may be divested of his stock is a subject upon which the League has not taken affirmative action. In the Parker consolidation bill and in the previous bills which have been considered by the committee, in some of them there were provisions for the acquisition of minority holdings and condemnation of stock. The first time that subject came up, the league, as a result of a committee report, went on record as being opposed to that; but later they rescinded that action and took the position that the question of whether or not there should be a provision of the law under which a man's stock could be condemned, was a subject that did not particularly affect the railroads, from our standpoint, as shippers, and was more properly a question between the investors and the railroads and the commission to be discussed before this Committee. However, I wish to make it clear that for several years the league has advocated strengthening the law so that investments of holding companies could not be laid hold of to defeat its purpose. We advocated that prior to the time that some of these holding companies have conducted some of the operations which have been detailed before you. It has been openly advocated and while we have never passed on section 6, and I have no authority to make any statement about it, I just wanted to make clear that we have for a number of years been opposed to any direct acquisition of control without the approval of the Interstate Commerce Commission.

I believe that there was some provision in the Parker bill—some provisions were suggested in that bill by Colonel Thom, as I recall, to cover indirect acquisitions of control.

If there are no questions, that is all of the statement I have to make.

The CHAIRMAN. Are there any questions?

Mr. GARBER. Mr. Chairman.

The CHAIRMAN. Mr. Garber.

Mr. GARBER. The position of the committee in 1928 was in favor of the developing plan of consolidation, was it not, as contradistinguished from the arbitrary plan.

The law provided for an arbitrary plan of consolidation of all of the roads. For four or five years the commission reported such plan as unworkable. The committee adopted the recommendations of the commission and in the Parker bill adopted what you might call a gradual developing plan.

Mr. FULBRIGHT. I think that would probably be the answer, but I can answer by reading the paragraph. It has not been read heretofore. It is very short.

> The unification of carriers or of property of carriers through any method or procedure provided for in this title, is hereby authorized in any case in which, in the opinion of the commission, such unification will promote the public interest.

In other words, it was a permissive provision.

Mr. GARBER. That is it exactly.

The CHAIRMAN. Well, that has been the law all of the time: permissive consolidation.

Mr. FULBRIGHT. It was our opinion that by fixing up a plan for consolidation there was the implication in the law that they would be compelled to sort themselves out according to that plan, and that it carried with it a compulsion, and as a matter of fact, it has been contended by some of the carriers, when they sought to acquire some control, that it was the policy of Congress that railroads should be consolidated, and we are opposed to legislation which is capable of that interpretation.

The CHAIRMAN. However, there was in the consolidation provisions a provision that provided for the reopening of the plan.

Mr. FULBRIGHT. Oh, yes; that is correct.

The CHAIRMAN. That has been in there all of the time?

Mr. FULBRIGHT. Absolutely.

The CHAIRMAN. We are very much obliged to you, Mr. Fulbright.

Mr. FULBRIGHT. Thank you.

Mr. LONERGAN. Mr. Chairman, before Mr. Thom proceeds, may I place in the record a statement I have, which is the latest statement issued, showing the ownership of the Pennsylvania Railroad Co., of the New York, New Haven & Hartford Railroad stock, and the ownership of the Pennroad Corporation of New York, New Haven & Hartford stock, and also the ownership of the Boston & Maine's stock, owned by the Pennroad Corporation, and the New Haven, through the B. R. H. Co.

(The statement above referred to is as follows:)

New Haven stock:		
Common	1,571,186	
Preferred	490,367	
Total	2,061,553	
		Per cent
Pennsylvania R. R. owns (common)	319,925	15.518
Pennroad owns—		
Common	148,800	
Preferred	1,200	
Total	469,925	7.276
		22.794
Boston & Maine stock	1,034,043	
Pennroad owns—		
Prior preferred	38,759	
First preferred	98,920	
Preferred	14,738	
Common	27,001	
Total	179,418	17.351
New Haven Co. owns (through B. R. H. Co.)—		
Prior preferred	43,980	
First preferred	4,151	
Preferred	6,543	
Common	219,189	
Total	273,863	26.484
Total	453,281	43.835

STATEMENT OF ALFRED P. THOM, GENERAL COUNSEL OF THE ASSOCIATION OF RAILWAY EXECUTIVES AND THE AMERICAN RAILWAY ASSOCIATION, WASHINGTON, D. C.

The CHAIRMAN. You may proceed, Mr. Thom.

Mr. THOM. Mr. Chairman and gentlemen, the bill before the committee, H. R. 9059, is commonly referred to as the holding company bill. It seems to me that that is a misnomer. Even in the aspects of the bill relating to that general subject, the provisions of the bill are not confined to holding companies. It relates to the whole subject of the holding of stock in carriers by anybody, by holding companies, by banks, by trust companies, or by individuals, and it would be a clearer definition of the bill and a more direct explanation of its purpose to say that it is a bill to regulate the holding of stock in common carriers, subject to the act to regulate interstate commerce.

The bill contains two major subdivisions. One is the provision relating to consolidations. The other is the provision relating to the holding of stock.

I understand that the draftsmen of this bill, having some doubt about the constitutionality of section 6, which contains a requirement under which the owners of stock purchased since February 28, 1920, must divest themselves of the ownership, considered that the constitutionality of that provision would be strengthened if it was tied up with the consolidation provisions of the law.

Without undertaking to discuss that question at this time, I call the attention of the committee that that position as to the constitutionality is not dependent upon any especial——

Mr. BECK. What is that that you said? I could not hear you. You dropped your voice.

Mr. THOM. I said that the constitutionality, as I understand it, was not dependent upon linking up the provisions about divestment of ownership with any particular statutory provisions in regard to consolidation.

Mr. MILLIGAN. Mr. Chairman, I would like to ask the witness a question right there.

The CHAIRMAN. Mr. Milligan.

Mr. MILLIGAN. Who do you refer to as the draftsman of the bill?

Mr. THOM. My understanding is that it was drafted by Mr. Eastman and Doctor Splawn.

Mr. MILLIGAN. Who do you refer to?

Mr. THOM. Who?

Mr. MILLIGAN. Who do you refer to?

Mr. THOM. In the remarks I am now making?

Mr. MILLIGAN. Yes.

Mr. THOM. I am referring now to the evidence given by Mr. Eastman.

I say that that constitutionality is, as I repeat, not dependent on the linking up with the requirement as to divestment of ownership of stock with any particular consolidation, but would be equally as strong if associated with any of the existing statutory provisions in regard to that subject.

At the present time we could find that there is in the law a provision in respect to a plan, conceivably, there might be an enactment, by Congress, doing away with that plan, and putting in some other method of consolidation, such as was contained in what was known as the Parker Bill, and the Fess Bill, and that whoever wished to sustain the provision in regard to the divestment of stock would be in as equally strong position if it was related to the then existing system of consolidation as it would be by picking out and reaffirming the present plan of consolidation.

I want to make that clear, because one of the principal objections that I shall make to this bill is that it does take up the existing plan of consolidation, reaffirms it, and in that way, I think, is directly contrary to the public interest.

And that the authors of the bill, or those who favor it, would have their position as to the constitutionality of section 6 by no way weakened if it were related to such authority for consolidation as then existed in the statutes.

So, that it is not necessary, I submit to the committee, for you to reaffirm in this bill this plan of consolidation, and I think it is manifestly inappropriate that you should do so because it has been so universally condemned by the commission itself and by the committees of Congress.

My understanding of the policy of the chairman is that when he finds a recommendation in a report of the commission that certain things should be done, he requests the commission to draft bills and send them down for the consideration of this committee, and of Congress; that thereby he does not commit himself to the bills that are thus sent down, but merely uses them as a basis for the consideration of the subject.

The CHAIRMAN. Yes; but this bill was not done that way, Mr. Thom.

Mr. THOM. I do not know any more about it than I heard outside.

The CHAIRMAN. Well, I have stated it in this committee three times, and I shall now repeat it, that when the suggestion of the Interstate Commerce Commission came down that Mr. Eastman, Doctor Splawn, Mr. Parker, and myself sat in the meetings to revamp and rewrite that bill, and brought this in, changing the recommendations of the Interstate Commerce Commission. Mr. Parker was absent from one of the meetings. There were five, if I remember correctly, when we were considering, going over, and rewriting the suggestions of the Interstate Commerce Commission. That is correct, is it not, Mr. Parker.

Mr. PARKER. That is correct.

The CHAIRMAN. So this is not a bill that was written by somebody in the Interstate Commerce Commission and sent down here and introduced by me. This bill we have under consideration, No. 9059, came into existence by the method that I am repeating now.

Mr. THOM. All that I am interested in, Mr. Chairman, in the remarks that I am now making, is that I did not understand that the chairman was necessarily committed to the provisions of this bill.

The CHAIRMAN. I am.

Mr. THOM. You are committed to the provisions of the bill?

The CHAIRMAN. Yes; of this bill, and I thought that that was made plain three or four times by the chairman. Certainly I have said, Mr. Thom, in your presence, that that was the way this bill, H. R. 9059, came into existence.

Mr. THOM. I do not know whether you said it in my presence or not. I have not been able to attend all of these hearings.

The CHAIRMAN. Yes; because I made the statement in answer to Judge Garber's questions the other day, and I made it in answer to some one else who appeared before the committee.

Mr. THOM. If that occurred in my presence, I did not appreciate it.

The CHAIRMAN. That has been stated in the committee at least three times before.

Mr. PARKER. In justice to myself, as long as there has been this explanation, I want to say that there are several provisions of the bill which I do not agree with.

The CHAIRMAN. That is true.

Mr. THOM. However that may be, that is what I thought to be the attitude of the chairman toward the bill. If I am mistaken in that, why, he has, of course, corrected me about it.

Mr. WYANT. Mr. Thom, is not this bill drawn in conformity with the declared policy of Mr. Eastman as to the regulation of railroads?

Mr. THOM. As to what?

Mr. WYANT. As to Mr. Eastman's declared policy as to the regulation of railroads.

Mr. THOM. I assume so, Mr. Wyant.

The CHAIRMAN. Now, Mr. Wyant, I trust that we may not have to go into that and that I may not have to explain it over and over again here—a fact that I have stated a dozen times.

Mr. Thom, you may proceed.

Henceforth, let us take these matters up, these procedures, in executive session, please.

Mr. THOM. Whatever may be the fact about that, I am here objecting to the provisions of this bill in regard to this plan of consolidation.

The CHAIRMAN. You are perfectly within your rights, Mr. Thom, to object to any provisions of the bill, but the parentage of this bill is another matter, and can not affect the provisions of the bill.

Mr. THOM. Not at all; but I was merely leading up to that to state the position that I hold in opposition to those provisions of the bill which relate to a reaffirmation of this plan of consolidation and that provision is found in paragraph (A) of section 2, which reads:

(A) The proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and shall be approved by the commission.

Now, as I was saying, Mr. Chairman, I do not consider the reindorsement of that plan as in any way essential to the purposes of anyone who wishes to sustain the constitutionality of section 6 of this bill, because if there was no reaffirmation of that plan and there was a mere linking up of the purposes of paragraph (6) with the statutory method of consolidation at the time in existence, the legal position would in no way weaken it, therefore, I think it is most unwise, and I hope to be able to convince the committee that it is most unwise to reindorse this plan.

Now, what is the history of it? As Mr. Hoch has said, the situation has changed somewhat since 1928 in respect to the plan, but it has changed only to this extent: That Congress, not having repealed the provision that a plan should be adopted under the whip and spur of existing law, an effort was made to place on paper the plan, and that paper plan is now in existence. Of course, the commission never thought that it was impossible to place on paper a plan, but they did think it was impossible to place on paper a workable plan. Now, the fact that the law, not having been changed, placed on paper a plan, which, as I shall contend, is not workable, does not change the situation to any substantial extent.

Mr. MAPES. Mr. Chairman, may I ask Colonel Thom a question?

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. What effect in law does it have to reaffirm paragraph (6)?

Mr. BECK. Will you speak a little louder? I did not get your question.

Mr. THOM. I did not hear it either, Mr. Mapes.

Mr. MAPES. I say, what is the effect in law of simply reaffirming this paragraph (a) of section 5?

Mr. THOM. My feeling about it is that it recommits Congress to a fallacy.

Mr. MAPES. Congress is committed to it until it repeals it anyway.

Mr. THOM. What did you say, Mr. Mapes?

Mr. MAPES. Congress is committed to it, until it repeals it, anyway—until it repeals the law, anyway, is it not?

Mr. THOM. Yes; but then to bring in an affirmative indorsement at this time, changing the situation—and, I want to explain why I say that. It was our original purpose to ask at the hands of Congress at this session a change in the consolidation law, because we believed that the present one was absolutely defective and unworkable. Now, the reason we did not do that, or we have not done it so far this session, was this: A proposal to which the railroads attach great importance, as an important constructive measure, was brought before the commission under the present plan and is now under consideration under the 4-party plan in the East.

To introduce this subject of consolidation might result in action that would be embarrassing to that position possibly, which, as we say, we attach great importance and consequently in order to leave the consideration of that matter unimpaired by further action we concluded it would be the wise thing to postpone an application for change in these consolidation laws till that had been disposed of by the commission one way or another.

By that, I mean to say, that at the appropriate time we propose to bring to you gentlemen a proposal for a change into a workable form as we conceive it of these provisions in respect to consolidations. We have not abandoned that and we do not want that proposal when presented to be a precedent by reindorsement of what we consider to be a great defect in the law.

Now, why I am justified in saying that it is a defect in the law?

The commission, under the existing law which was enacted in 1920, tried for five years to produce a plan. It employed to aid it in that effort, Professor Ripley, of Harvard. It held hearings throughout the country and in 1925 it absolutely abandoned the idea that it was practicable and its report to Congress in 1925, in its recommendations on page 72, it said:

That paragraphs (2) to (6), inclusive, of section 5 of the Interstate Commerce Act be amended: (a) By omitting therefrom the existing requirement that we adopt and publish a complete plan of consolidation;

In its report to Congress in 1926, in its recommendations on page 76 it repeated that recommendation.

In its report to Congress in 1927, it said on page 65 the following:

Pending needed legislation to situation as to consolidation of carrier property under paragraphs (4) to (6), inclusive, of section 5, as summarized in our last report, remains unchanged. In the meantime the process of unification or acquisition of control by carriers of other carriers under paragraph (2) of section 5 has been continuing as appears elsewhere in this report.

It follows on page 80 with the renewed recommendations.

That paragraphs (2) to (6), inclusive, of section 5 of the interstate commerce act be amended: (a) By omitting therefrom the existing requirement that we adopt and publish a complete plan of consolidation.

In the annual report of the commission for 1928, under the title "The Consolidation of Railroads," on pages 60–61, occurs the following:

In our report of 1925 we called attention to a letter addressed to the chairman of the Senate Committee on Interstate Commerce, dated February 4, 1925, to which was attached a proposed amendment to section 5 of the interstate commerce act. One of the principal things to be accomplished by the proposed amendment was to relieve the commission from its present duty of adopting a complete plan of consolidation, which was deemed desirable by a majority of the commission as then constituted.

And further:

These proposed amendments were again called to the attention of Congress in our report of 1926. It was stated that the need for amendment had been de-

veloped in hearings before the appropriate committees of both Houses of Congress, and that pending action thereon, we had deferred adoption and publication of a complete plan.

In our last report we reviewed our suggestion of needed legislation. We made known that in the meantime the process of unification through acquisition of control by carriers of other carriers under paragraph (2) of section 5 was being continued. This process of unification has continued during the past year as described elsewhere in this report.

Under the title "Recommendations" in this same report, on page 81, the commission said:

3. That paragraphs (2) to (6), inclusive, of section 5 of the interstate commerce act be amended: (a) By omitting therefrom the existing requirement that we adopt and publish a complete plan of consolidation.

As I understand Mr. Eastman in his testimony in this case, he still does not favor a complete plan of consolidation and the reason is manifest. The subject is one that does not admit of arbitrary treatment. Here is a vast net of railways covering the continent, differently situated, differently operated, subject to different policies, and the wit of man does not permit the making of a rigid plan and pressing it down upon that network of railroads, and saying that this must be the way that these railroads must be consolidated. Instead of that, the only way of consolidating these railroads is, as Judge Garber has said, by a developing plan, which means that a group of railroads must get together, form plans, devise a means of carrying them into effect, make their final arrangements, and then bring them forward to the Government tribunal for its approval or disapproval of what they propose.

Now, it is manifest that this plan would not work, because of what is now happening. The commission itself has abandoned the plan, at the petition of the Southern Pacific in allowing it to consolidate with the Cotton Belt.

At the present moment, the most powerful railroad interests, probably, in the country are before the commission requesting them to make other changes in the plan so that they can carry out a method of consolidation which they have arranged to put into effect. It is true that there have been one or two consolidations, or acquisitions of property that occurred with the plan, notably, the acquisition by the Baltimore & Ohio of the Buffalo, Rochester & Pittsburgh road; but that was not done because of the plan. The plan did not cause that. It happened to fit in with the plan that company had been carrying out and that is shown by the fact that the Baltimore & Ohio Railroad, that made that acquisition, is now before the commission asking it to change its plan in connection with this 4-party system.

Mr. HUDDLESTON. Colonel, may I ask you this question?

Mr. THOM. Yes, sir.

Mr. HUDDLESTON. You have discussed how the statute contemplates that consolidations shall be brought about. Is it your interpretation of the statute that it contemplates that several independent groups of carriers may cooperate together for consolidations into the separate groups, as is now proposed by the 4-party plan?

Mr. THOM. You mean necessary for several groups to come in together? I should think it permissive. I do not think it is necessary.

Mr. HUDDLESTON. Is it permissible for groups of carriers to divide among themselves and to allot to separate groups, lines of railroad; is it permissible for such prearrangements to be made under the consolidation clause?

Mr. THOM. It is not permissible for them to allot finally.

Mr. HUDDLESTON. I mean allot them temporarily and agree among themselves as to which group shall receive a particular carrier?

Mr. THOM. I think it is permissible for them to agree among themselves as to how they would be willing to consolidate and come in several groups together for that purpose, but always subject to the action of the Interstate Commerce Commission in giving or withholding approval.

Mr. HUDDLESTON. Is it your view that Mr. Atterbury, Mr. Crowley, Mr. Willard, and Mr. Van Sweringen were permitted to get together around a table and agree among themselves for the apportionment of the various transportation systems in the eastern States among their respective systems, agreeing with each other, "I will take this carrier and you will take that," or "I will let you have these lines without opposition, if you will let me have the other line," and in that manner divide up the transportation system of the country?

Mr. THOM. Do you mean whether that is permissive?

Mr. HUDDLESTON. Whether the act contemplates that.

Mr. THOM. I do not know what you mean by "contemplates." I think it is permissible under the act. I think that it is permissible under the act.

Mr. GARBER. Under the present act?

Mr. THOM. I am referring to the present act, and the provisions in that act.

Mr. HUDDLESTON. Does it not involve the feature of an agreement among the parties as to what lines shall be assigned to systems in which they have no interest, and an agreement among themselves to cooperate to bring about certain consolidations in which they have no interest and which may affect competition among themselves?

Mr. THOM. There is nothing in the law, as I see it, to prevent them from making, coming to that understanding among themselves, subject to the approval of the Interstate Commerce Commission.

Mr. HUDDLESTON. The provisions of the antitrust laws were lifted by the transportation act of 1920 in certain limited respects. As I get it, that lifting was limited only to an agreement among certain carriers that they together should consolidate into a single system and that the antitrust law was not lifted in its prohibition of an agreement in restraint of competition not intended for the purpose of bringing about consolidation into a single particular system.

Mr. THOM. As I understand it, there was no agreement possible, and none was attempted to be put into final effect; that there was an arrangement made by which they would be willing to consolidate these various groups on the line which they indicated; but there was no agreement in restraint of trade, because there was no agreement whatever. It was all made subject to the approval or disapproval of the Interstate Commerce Commission.

Mr. HUDDLESTON. Is it your view that the act contemplates that several consolidations should be considered in one proceeding and at one time?

Mr. THOM. If we do not differ on the meaning of the word "contemplate" and you allow me to use the word "permit."

Mr. HUDDLESTON. I mean to say——

Mr. THOM. Permits, I would say.

Mr. HUDDLESTON. Not quite "permits." Many things are permitted under the forms of law which the legislative body did not contemplate. Was it in the legislative mind?

Mr. THOM. I do not think I can say. I think that anything is in the legislative mind that is permitted under the act, and I think this is permitted under it.

Mr. HUDDLESTON. That there shall be several different combinations as part of the same agreement and the proceeding upon it, instead of a single consolidation.

Mr. THOM. That there may be; not that there shall be; not that there shall be; but that there may be.

That is my judgment.

Mr. COOPER. Mr. Chairman, I would like to get this clear in my mind. Is there anything wrong with a group of railroads meeting together in conference and trying to iron out some plan of consolidation, knowing whatever plan they did agree to would have to be submitted for the approval of the commission?

Is there anything criminally wrong about that?

Mr. THOM. I do not think there is anything criminally or morally wrong.

Mr. BECK. Was it not in deference to the wish of Congress that they should formulate the several consolidations?

Mr. THOM. I think it is also on record that it was under the recommendation of the President that it should be done.

Mr. HUDDLESTON. It just so happens that the President was not properly a factor in the situation.

Mr. THOM. Was not?

Mr. HUDDLESTON. That is under the Constitution was not a part of the picture.

Mr. THOM. No; not a party?

Mr. HUDDLESTON. The President had no function. It is a congressional matter.

Mr. THOM. It is not a congressional matter any longer, until Congress acts again. It is an administrative matter under the law.

Mr. HUDDLESTON. This consolidation was a subject within the scope of the exclusive functions of Congress. Only Congress had the right to authorize the consolidation, and the President was not in the picture, because the Constitution does not put him in it.

Mr. THOM. Only when the Congress authorizes the commission to do it.

Mr. HUDDLESTON. Congress created the commission; Congress invested it with such authority as the commission had. It was not within the province of the President to deal with the commerce clause. It did not relate to the executive department of the Government.

Mr. THOM. I hope you understand, Mr. Huddleston, that I am conceding to the Interstate Commerce Commission complete authority over the subject. Any reference that I have made to anybody else, I was grazing merely the question of public opinion of the country just such as I am now expressing, as my own opinion, that this is a most constructive measure.

Now, I may be all mistaken about that, and the men in authority and in the public confidence may differ with me, or they may agree with me; but I think it is a most constructive measure and I do not, as Mr. Cooper says, see anything wrong morally or from the standpoint of criminal procedure in such a course being pursued when they come forward and say:

> Here is what we are able to do. Here is what we think is in the interest of the public to do, and does it meet with your approval or disapproval? If it meets with your disapproval, we are not going to attempt it. If it meets with your approval, we are going to attempt to put it into effect.

Now, I see nothing wrong with that attitude.

Mr. GARBER. Right in that connection, Mr. Chairman, may I ask the witness a question?

The CHAIRMAN. Mr. Garber.

Mr. GARBER. Consolidations are only effective upon the approval of the commission. The commission is authorized in passing upon the effect of such consolidations to interpose such terms and conditions as it might determine the public interest would require.

Mr. THOM. That is my interpretation of the law.

Mr. GARBER. Even to the extent of requiring the consolidation to take in additional lines.

Mr. THOM. That is correct.

It is not written out in this statute as plain as it was by the bills which were approved by this committee, but my interpretation of the authority of the commission when they were given the power to approve or disapprove, if they can say, "We approve this on condition," and it is a valid exercise of authority for them to give approval on condition which should not take effect until that condition is satisfied.

Mr. GARBER. Here is the language of existing law [reading]:

> It may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe.

Mr. THOM. Yes; there is the express authority for it.

I have another thought, and that is, if the Parker bill had gone through there, I would think that they would have had the power, subject to approval.

Mr. COOPER. Inasmuch as the President's name has been mentioned here, I want to ask you this question:

Did he not invite the railroads to get together and try to formulate some plan of consolidation and submit it to the commission?

Mr. THOM. Well, all I know about that was what was in the public press, and it was so stated in the public press. That was what I understood that he invited the railroads to do, as I got that from the public press. That is all I know about it.

Mr. BECK. Is it not a fact that President Harding in a speech in St. Louis indicated that, and President Coolidge followed that policy, and President Hoover is simply following the policies of his predecessors, in view of the reasonable considerations, that it is not compulsory but in the interest of the public.

Mr. THOM. Mr. Beck, there is no doubt that it is a fact that every President for the last 10 years—Mr. Coolidge, I think five times, in his messages to Congress—has recommended that consolidation laws be made—be changed so as to make them more workable.

The CHAIRMAN. Since we have gotten off on this President "business," Mr. Harding said that he thought it was a good policy to consolidate the railroads of the country into a limited number of systems, fairly done and in the public interest. Mr. Coolidge followed along, but they never, either one, went so far as Mr. Hoover in indorsing a plan that was proposed by some railroad group that he could not have known much more about than the average one of us, because he had not made the necessary examination that the commission only should be called on to make, before he indorsed it.

Mr. THOM. I do not understand that President Hoover has indorsed any particular plan. I understand—and perhaps it was inappropriate for me to have mentioned the instance—whatever it was, there has been a unanimous condemnation of the existing law as it is. It has been abandoned by the commission and it has been condemned in most every way as an impracticable plan by most of the eminent members of this committee.

In the first place, in the report on April 13, 1928, when the Parker bill, known as 12620, was favorably reported to Congress, the majority said:

> The provisions of existing law, however, under which it was contemplated that this policy should be carried out, have proved impossible of administration; and the provisions of existing law which were contemplated to be of only temporary application, and which are admittedly inadequate, have been and are being resorted to.

Now, in the minority report, which was signed by Mr. Rayburn, Mr. Huddleston, Mr. Parks, Mr. Crosse, Mr. Shallenberger, Mr. Milligan, and Mr. Perry, this is said of the plan, in their minority report to the Congress on that bill:

> Paragraphs 4, 5, and 6—

Those are the paragraphs providing for a plan—

> have been found unworkable for the reason that they require the Interstate Commerce Commission to authorize unifications only after the adoption of a complete plan for consolidation of all railways into a limited number of systems. This the commission has found it impracticable to do, as it was too ambitious a plan and what no man or no commission had the wisdom or the foresight to be able to put into effect. The minority was willing and desirous of joining in the correction of these defects in the existing laws. A recommendation that this be done has been made by the Interstate Commerce Commission in its report to Congress for 1925, 1926, and 1927, in the following language:
>
> "Paragraphs (2) to (6), inclusive, of section 5 of the interstate commerce act be amended (a) by omitting therefrom the existing requirements that we adopt and publish a complete plan of consolidation."

The CHAIRMAN. Yes; and that is probably the position of the majority now, if we were writing that report over on that bill, but my contending with you, Mr. Thom, has been and is that the bill before us does not have anything to do, and does not affect, and in no wise attempts to affect the plan or the consolidation action of the Interstate Commerce Commission, acting as they now exist except to make an additional requirement that before railroads can be consolidated outside of the law, in effect, that that acquisition and that consolidation must have the approval of the Interstate Commerce Commission by consolidation, or by other methods.

Mr. THOM. In reply to that, Mr. Chairman, I would like to reiterate that, in my judgment, as a matter of law, it is unnecessary for this committee or Congress to reindorse this plan even to carry out the purpose of the bill; that then it is manifestly inappropriate for it to be reindorsed, when it has been so scathingly denounced by this committee as an impracticable thing and unworkable, and the wisdom of men was not adequate to put it into effect.

To reindorse it now would be, in my opinion, to erect an obstacle in the way of a consideration of this subject on its merits when it is again brought before this committee, and as the committee does not approve, either the majority or the minority, and as the Interstate Commerce Commission does not approve, why reindorse it? If it is not necessary for the main purpose you have in the bill, why reindorse it? And, is it not altogether likely that if you do reindorse it, and we are at this side of the bar asking a change in that, that those who want it this way, will say not only did Congress pass it in 1920, but it reindorsed it in 1932?

Now, that is my objection, and that is my object in pleading with this committee that it do not put itself in a position of reindorsing a plan which not a member of the committee on the majority or minority thought it was possible to create out of the limitation of human intelligence.

The CHAIRMAN. Well, in this 4-party proposal before the commission now, the railroads in their getting together propose to go to the recommendations of the commission in its plan?

Mr. THOM. They are asking, as I understand—and I want to say, Mr. Chairman, that I do not know this. I have never read their petition. I am not at all connected with their applications, and I am only talking from what general information I have, such as you have; but, as I understand it, what their application to the commission is, is saying the plan you have made is not workable, and we wish it changed in these respects, and we are asking you to do this.

The CHAIRMAN. Their getting together was for a much broader plan.

Mr. THOM. I suppose they were, from what they have done.

The CHAIRMAN. They have the right, under the law, to ask that that be reopened, and that the commission consider an entirely different set-up than what they have laid down in their plan. That is what they are doing now.

Mr. THOM. As I understand it, they are asking that the plan be disregarded and modified. Now, that is not a reindorsement of the plan. I do not suppose that any of you gentlemen have changed your opinions on this subject. I certainly have not changed mine. I believe that the plan was a great mistake, and embarrassment, rather than a help, toward consolidation, and what I would like to see done, in any legislation that you adopt, instead of restating that plan, that you link it up with such statutory provisions on the subject of consolidation as may at the time be in force.

Mr. MILLIGAN. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Milligan.

Mr. MILLIGAN. Mr. Chairman, as I understand this situation, Mr. Thom, it is that at some future date when you come before this committee, asking for an amendment of that section of the transportation act, you are afraid of some psychological effect that it might have upon the members of this committee?

Mr. THOM. I am.

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Mr. MILLIGAN. That is your opposition?

Mr. THOM. Yes.

Mr. HUDDLESTON. Colonel, may I ask you just what change you suggest in this bill to eliminate what you object to?

Mr. THOM. I do not think it is necessary to repeat what you have just said, but if we can adopt appropriate language making paragraph (6) apply as a part of the machinery to carry out the consolidation plan; then, in effect, under the statutes of the United States, and that it is not necessary to say anything about anything we ask or anything now existing in the law, but under the statutory requirement in respect to consolidations as they then exist under the acts of Congress.

Mr. HUDDLESTON. Now, would you eliminate this paragraph (a) altogether?

Mr. THOM. Altogether.

Mr. HUDDLESTON. And not merely all down to the final line, that is, to the final clause, which requires that it shall be approved by the commission.

Mr. THOM. Oh, no; I certainly would have that in there.

In other words, "the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties" when authorized by the statutes of the United States then in force and "shall be approved by the commission."

Mr. MAPES. Mr. Chairman.

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. These additional words in paragraph (A) "merger, purchase, lease, operating contract, or acquisition of control," do they have any particular significance in your opinion?

Mr. THOM. I do not know if I quite appreciate what is in your mind, Mr. Mapes. I think they do have significance.

Mr. MAPES. What is in my mind is this, if they have some additional significance, is not that the reason for putting that paragraph in there, rather than to reaffirm the attitude of the committee or of the Congress on that particular thought which you have been emphasizing?

Mr. THOM. I think that what you gentlemen have in view is to subject any acquisition of control—what this bill has in view, is to subject any acquisition of control to the approval of the commission. Those words, therefore, "acquisition of control", enlarge somewhat the present law, because the question may arise, and, in fact, has been decided by the commission, as I understand it, that if there is no violation of the antitrust laws, any railroad company having corporate power under its charter to resort to the laws of a State for the purpose of making or acquiring control, not of consolidation—of acquiring control.

Now, this would state that although that was a right under paragraph (2) of section 5, until this act was passed there should be no acquisition of control under this act unless approved by the commission, and it would enlarge the power of the commission in that respect.

Mr. MAPES. If this legislation is to accomplish the purpose designed and be made effective, is it not necessary to include those words in order to bring the acquisition of control through holding companies, we will say, under the jurisdiction of the Interstate Commerce Commission. Is it not necessary to rewrite that section in order to—rewrite it in some form in order to carry out the evident purpose of the legislation?

Mr. THOM. I think not. I think, as I said, that you can accomplish all you have in mind if you omit the words "shall be in harmony with and in furtherance of the plan for consolidation of railway properties established pursuant to paragraph (3)"—if you omit those words, and in their place insert "shall be in harmony with statute law of the United States relating to the consolidation and shall be approved by the commission."

Acquisition of control is in there.

What I am trying to make clear is that in the remarks I am now making I am dealing with this bill from the standpoint that you gentlemen desire to accomplish a certain purpose, and I am saying to you that your purpose in that respect, provided it exists, which, of course, I do not know, but your purpose in that respect will in no way be interfered with by omitting the words I have referred to and by making the substitution I have referred to, but that with every acquisition of control it would then be necessary to be approved by the commission under the laws of the United States as they might then exist.

Mr. HOCH. Mr. Chairman.

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. Colonel, I do not want to anticipate your argument in the question I am going to ask, and if it is something that you are going to deal with later, and it will divert you, I will not ask you to answer it now.

Leading up to it, may I make an observation, following out the same thought which Mr. Mapes had? As I have read this bill, it has two references to the plan: The first one is in paragraph (a) on page 2, to which you were then referring, and the second one is in paragraph (6) on page 6. The first reference, it seems to me, is simply incidental to making effective the present law by extending supervision to the holding companies, and that there was no intention there to do anything except to reenact the law into a form that would bring the holding companies into or under supervision of the commission; but now, coming to the reference in paragraph (6) on page 6, the paragraph that has to do with the matter of divestiture of stock, it has seemed to me that that brings in the question of a general plan in a new relationship. The question I have is whether you intend to discuss this matter of divestiture of stock acquired subsequent to February 28, 1920, if the provisions of the bill were changed so that it would make no reference to the plan, but would simply have to do with divestiture of stock which, in the judgment of the commission, constituted a measure of control that was contrary to the public interest?

Would the objections which you urge to the provisions with reference to divestiture still obtain, in your judgment, even though this paragraph (6) were redrafted and no reference were made to stock that was held in the way which in the commission's judgment, to quote the language on lines 4, 5, and 6, of page 7, "is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan"?

That is a rather involved sentence, and maybe I can put it a little more simply now.

If paragraph (6) did not contain the language I just read and contained language having no reference to the plan, but simply providing that the commission should have power to enforce divestiture of such stock acquired since February 28, 1920, as in the judgment of the commission constituted a measure of control contrary to the public interest, would you still offer your objection to the provision as to divestiture?

Mr. THOM. I am going to discuss that somewhat from the constitutional standpoint in a few minutes, Mr. Hoch, and also I do not intend to go into a very lengthy discussion of that provision, but I want to call attention to one or two practical matters in connection with it, as well as its effect on the law question.

Of course, what I have said about taking the reference to the language out of paragraph (A) would relate to taking the plan, making of a plan, anywhere else that it occurred in the bill, and the subsitution therefor of such language as would not weaken the constitutional question, from the standpoint of the advocates of this bill; but would relieve against this very objectionable feature which I, in common with every member of this committee, feel is the plan.

Mr. HOCH. But how can a provision be drafted which brings holding companies within the purview of the law and which ignores the fact that the provision as to the plan still does exist in the law?

Mr. THOM. Because when you relate to the holding company question, to consolidation, you can do it in general terms and not be obliged to relate it to this particular plan.

Mr. HOCH. The other provision with reference to acquisition of control through other means, are related in the law to the plan?

Mr. THOM. As it stands now.

Mr. HOCH. As it stands now; unless we are going to change all of that language, why should we concern ourselves about a mere addition of one or another means of acquiring control as related to the plan?

Mr. THOM. My objection to it is having a relation to this plan, any purpose that you have to require the divestment of stock would be just as well supported by a reference to what the law is at the time that the divesting order is entered. If the plan now in the law is in existence it would relate to that. If another plan or other method of consolidation or other policy of Congress were in the law at the time, you would relate to that.

So that I do not believe that what I am now suggesting would in any way weaken the argument that those who wish to support the constitutionality of this power of divestment would desire to make would be just as strong in the one case as in the other.

The CHAIRMAN. Any reference to the plan, I might say, would be, the plan is not immutable. It is changeable and can be changed at any time the Interstate Commerce Commission wants to do it, and it appears that if they approve this four-party plan that is presented there by the railroads, they have got to change this plan very radically, and the plan here would be whatever plan they would have at that time, and, of course, the complete plan as submitted would be very much divided by the consolidation into these four systems that is now proposed by those who have presented it to the Interstate Commerce Commission.

Mr. THOM. Why, they say that whatever consolidation there shall be, shall be in accordance with that plan. It is in accordance with whatever may be the law of the land at that time.

The CHAIRMAN. The commission, at any time they approve consolidation, must have a plan with reference to that consolidation.

Mr. BULWINKLE. Mr. Chairman, may I ask a question?

Mr. THOM. Merely a provision that we are going to ask of Congress in respect to that plan.

The CHAIRMAN. You do not mean that you intend to suggest this as an amendment to this bill?

Mr. THOM. No; I am just illustrating what I have in mind. It reads:

> A. The proposed consolidation, merger, purchase, lease, operating contract or acquisition of control shall be in harmony with the laws of Congress at the time in effect relating to such matters and shall be approved by the commission.

That is instead of the plan, as we understood it, being rigid, and everything being done, must be done in accordance with it, unless modified, and then in accordance with the modification of it.

Our theory was, and I believe it is a correct one, that the studies of the commission in respect to making that plan should be only used as helpful to them to make a very comprehensive conception of the whole railroad system of the United States.

Now, any particular application would affect the general situation.

Mr. BULWINKLE. Colonel Thom, in reference to paragraph (A), you have spoken of, would you have any objection to amending it by inserting in that portion which you have cut out—

> And in furtherance of the plan advanced for the consolidation of the railway properties established or hereinafter established pursuant to paragraph (3)?

Mr. THOM. I want to cut out paragraph (3).

Mr. BULWINKLE. You want to cut out paragraph (3)?

Mr. THOM. I want to cut that out of the law.

Mr. BULWINKLE. It is clear to my mind, then, that your argument is based upon the fact that if we were to adopt this, that then, under the law, we establish the plan which has been adopted by the commission in 1929, as the plan which would have to be followed hereafter.

Mr. THOM. I object to that, and object to that as a change, and I do for the reasons I gave Mr. Milligan, that I believe a reindorsement of that plan would have a hurtful effect upon a most philosophical system in regard to consolidation.

Mr. SHALLENBERGER. I would like to ask a question.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. Would you say that it would meet the situation to erase the word "the" and write in instead the letter "a."

Mr. THOM. That bill, Governor, that bill would have the effect of reindorsement of the policy of paragraph (4) in the old bill, and paragraph (3) under this bill.

Mr. SHALLENBERGER. You do not object to the provisions of this law that seek to prevent consolidation by holding companies without the consent of the Interstate Commerce Commission; that is not what you are objecting to?

Mr. THOM. In reply to that, Mr. Shallenberger, it seems to me that is the real purpose of this bill.

In reply to that, I would like to read paragraph (2) of section 202 of the Parker bill, which was reported favorably by a majority of this committee:

(2) It shall be unlawful for any carrier, after the enactment of the railway consolidation act of 1928, to consolidate or merge with any other carrier, or acquire directly, or indirectly through any agency, any right, title, or interest in any of the railway properties of, or any of the voting securities issued by, any other carrier—unless such consolidation, merger, or acquisition shall be in accordance with the provisions of this title or with an order of the commission,

And so forth.

Now, therefore, the railroads took the position that they would favor the requirement that the approval of the commission should be secured before there was any acquisition by one carrier of another carrier, directly or indirectly.

Mr. SHALLENBERGER. That is necessary; that should be required.

Mr. THOM. That would be required so that what I am referring to here is not the approval of the commission, because we have gone along with that requirement from the start. It is only objecting substantially to fixing a plan which you gentlemen have denounced as being beyond the wit of man to create and in which I thought you were very wise, and I want to do nothing to go against your view at that time, or against your view, which I entertain now, so that this whole subject of consolidation, which I regard as of the utmost importance, shall not be prejudiced by a reaffirmation by this Congress of a thing which they have previously condemned.

Now, I want to say—this is in digression, but I want to say this: I refer to the importance of consolidation. Commissioner Eastman, in his testimony before this committee, either on the present bill or in connection with section 15a, called attention to the fact that he regarded as one of the troubles in railroad management at the present time, the overindulgence in wasteful competition; that he pleaded for a spirit of cooperation among the railroads to counteract the cutthroat and wasteful competition.

Now, I look to consolidation by which certain competing roads will be brought into a consolidated system as creating a situation which would omit, pro tanto, an escape from that hurtful system to which Mr. Eastman was referring, and I think that the more we study this railroad question the more we understand the conditions that surround it, the more we are bound to come to the conclusion that the way out is more largely through consolidation than any other method.

And that I say merely to explain my earnestness in requesting this committee not to reindorse a plan that it has so formidably denied and that has not had a friend, I do not believe, inside or outside of the commission at all. You would be surprised if you read the concurring opinion of Commissioner Porter, who prepared this plan, to see the lukewarmness with which he refers to it, and if you read Mr. Eastman's views on the subject, you will see the way that he referred to the plan. It does not have the support of anybody of public opinion at all, in my judgment. It was put into this law at a time when the subject was new, when the future of it was not appreciated, and everybody has denounced it as unworkable since that time.

Now, under those circumstances, inasmuch as I believe that the way out of these railroad difficulties is to be largely found through consolidation, I hope that you will excuse my earnestness in trying to get rid of the reindorsement of a faulty provision which might have a hurtful effect upon the future philosophical legislation on the subject.

Mr. SHALLENBERGER. Paragraph (3) is what you object to, or the plan they adopted under paragraph (3)?

Mr. THOM. I want to get rid of the plan with all of its legislative implications and effects extending all over the United States.

I want to get rid of it so that the commission may consider and understand each application, and how it will affect the policy of the country.

Mr. SHALLENBERGER. The present law requires that the commission's plan shall be considered only.

The CHAIRMAN. Mr. Thom, will you come back to-morrow morning at 10 o'clock?

Mr. THOM. Yes, sir.

The CHAIRMAN. Then, we will stand adjourned until 10 o'clock to-morrow morning.

(Thereupon, at 11.45 o'clock a. m., the committee adjourned until 10 o'clock a. m. of the following morning, Wednesday, March 2, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

TUESDAY, MARCH 15, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn, chairman, presiding.

The CHAIRMAN. The committee will come to order.

Mr. Thom was giving testimony before the committee when we adjourned last, and he has been ill since, and I have told Mr. Fitzpatrick and Judge Heiserman that they might go on at this date, and present whatever testimony they may have in explanation of or in opposition to this bill, and I told them that they could have four days this week, in order to present their side of this case, if they desired so much time, and Saturday, I believe, it was, Judge Heiserman called me on the phone and said he would like to have Mr. Potter go on this morning.

Mr. BECK. Have who go on?

The CHAIRMAN. Mr. Potter.

Mr. BECK. Thank you.

The CHAIRMAN. He is an ex-member of the Interstate Commerce Commission, and so, Mr. Potter, if you are ready to proceed, we will hear you.

STATEMENT OF MARK W. POTTER, NEW YORK, N. Y.

Mr. ——— Mr. Chairman, may I interrupt just a moment to ask that the security owners be allowed about 20 minutes during the progress of this hearing.

The CHAIRMAN. We will try to do that.

You may proceed, Mr. Potter.

Mr. POTTER. Mr. Chairman, when the original Parker bill was before this committee, in April, 1931, I was the owner, unfortunately, of a small amount of shares of railroads and holding companies. It seemed to me that——

The CHAIRMAN. Mr. Potter, will you state for the record whom you represent, and just what your connections are.

Mr. POTTER. I was just about to state that, Mr. Chairman.

I asked originally for permission to be heard because of my status as a railway stockholder, and as a holder of stock of holding companies.

Mr. NELSON. As what?

Mr. POTTER. As a holder of railway shares, and as a holder of stock of a holding company.

It is only in that capacity that I asked for a hearing. Later, certain holding company interests who knew of certain contacts that I had had, which tended to familiarize me with this general field of regulation asked me what my attitude was toward this bill

and I told them that I was opposed to it. They then expressed the desire that I appear before this committee.

So, I am here now in my capacity as a stockholder, and at the request of these holding companies. I want to make it perfectly plain, however, that I am not representing the holding companies. I am speaking only my own views, and I think it quite likely that I have some views on the general subject that the holding companies will not agree with.

I do not want them, therefore, to be bound or affected by anything I may say. I am here expressing my own views, because of the substantial interests which I have, which I think will be seriously affected by this bill.

Does that answer the question sufficiently?

The CHAIRMAN. It does.

Mr. BECK. Mr. Chairman, to complete the picture, might I ask if the witness is a member of the bar, or a financier; I have not gotten that statement.

Mr. POTTER. I am a member of the bar practicing in New York City.

Mr. BECK. Thank you. That is all I wanted.

Mr. POTTER. And perhaps it is proper for me to say that, the facts will appear, that for five years, 1920 to 1925, I was a member of the Interstate Commerce Commission. I was a member of division 4 of the commission, which had to do with everything done during those five years with respect to section 5 of the interstate commerce act.

House Resolution No. 5059, which is now being considered by this committee has a two fold object: One object is to subject all acquisitions, consolidations, and other forms of unification of railroads to the approval or disapproval of the Interstate Commerce Commission and to the exclusion of the laws of the States and State officials.

The other object is to empower the Interstate Commerce Commission, to require holding companies which have been formed since 1920 and which have acquired control of railway securities to divest themselves of such ownership.

It is well known that owing to the conditions which prevail generally throughout the financial world, there is little likelihood that any additional holding companies of any consequence will be formed for a considerable period. It must be, therefore, that the immediate object of this bill is to empower the commission to require holding companies which have been formed to divest themselves of their ownerships.

In that aspect, it is not unfair to say that this bill primarily is an attack on holding companies which have been formed during recent years, the companies which are thus aimed at having been mentioned time and time again on this record.

The bill would authorize the Interstate Commerce Commission to require holding companies now in existence and owning control of important properties to sell their security, holdings, within a limited period at a price to represent their fair normal market value.

And, pending such sales, the commission is to have the power, through some trusteeship to divest the owner of the shares of the voting power on his holdings. No weight is to be given to the price paid by the holding companies for their holdings. No attention is

to be paid to their plan. What is to be taken as fair normal market value seemingly is to be left to the commission.

Commissioner Eastman states that if present values persist they may become normal.

This fair, normal market value idea of Resolution 9059 has had an interesting evolution. House Resolution 71226, of the Seventy-first Congress, introduced February 21, 1931, seemingly had no provision for divesting holding companies of their present ownerships. It looked only to the future. Evidently after the adjournment of the Seventy-first Congress there developed in someone's mind the thought that the Parker bill was lacking in teeth.

We find therefore, in the first Rayburn bill, House Resolution 5324, introduced December 10, 1931, a provision giving to the commission power to force the holding company to divest itself of its stock. That bill authorized the commission to investigate and determine whether a stock holding was likely to hinder the consolidation of railway properties, and if the commission found such holding was likely to cause such hindrance the commission was given power to require such persons to divest themselves of such stock or other share capital to the extent, within the time and in the manner to be prescribed by the commission as necessary for putting an end to such hindrance.

There was no limitation in that bill respecting the price at which the holding company could be compelled by the commission to divest itself of its holdings.

At some later date, there seemingly developed the idea of the Rayburn bill, of December 10, went too far, and that there should be some restriction on the power given the commission with respect to the price which holding companies could hope to receive for their holdings. The second Rayburn bill, House Resolution 9059, introduced February 9, 1932, which is now before this committee was the thought of that date.

The commission in its 1931 report recommending that they be given control of acquisitions generally, suggested that it might be desirable to authorize the commission to require the divestment of stock ownership of present holding companies. The commission, however, refrained from making any suggestion as to the terms on which divestment could be carried out.

Commissioner Eastman, when he appeared before this committee, called attention to the fact, House Resolution 9059, went beyond the commission's recommendations, but he said that the legislative committee of the commission was in sympathy with the bill.

The fair normal market value idea evidently originated with Commissioner Eastman, and here let me say, because we have got to discuss this thing with a common understanding, this whole bill is an Eastman bill, and that is not to his discredit or to the discredit of the bill. There was some talk at one of the sessions of the origin of this measure, out in the hall. I am sorry that I was not present when that discussion took place, because I could have told where and when the bill originated.

Mr. IGOE. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Mr. IGOE. I want to ask a question as to what you mean, Mr. Potter, when you say that this is a whole Eastman bill. Do you mean that he did not take it up with the balance of the members of the Interstate Commerce Commission?

Mr. POTTER. I would like to discuss that feature later. What I mean is that the idea of this bill arose in Commissioner Eastman's mind in 1920.

Mr. IGOE. Did he have anybody else helping him?

Mr. POTTER. I do not know as to what extent he was helped. There is a very interesting aspect, which I will develop as I go along. I merely want to say, and I shall convince you, that his whole idea of extending the field of regulation, as this bill does, originated with Commissioner Eastman.

Mr. GARBER. What difference does that make?

Mr. HUDDLESTON. That is what I want to know.

Mr. GARBER. I do not think that we ought to waste any time as to where it originated. The question is what does it do and what is your opinion of it.

The CHAIRMAN. Mr. Potter, if you will allow me to say this, I have stated so many times here about how this bill was written that, frankly, it is getting to be just a little bit of a sore spot for me, and I want to say this to you, that even had Mr. Eastman written the bill, in its entirety, and sent it down here, and it had been introduced as he prepared it. Just what does that have to do with it? It is no reflection upon it, do you think, because I understand that you are very friendly to Mr. Eastman.

Mr. POTTER. I think that this committee is very fortunate, and that the commission is very fortunate, that Mr. Eastman is on the job. There is no one that admires him as much, that I know of, as I do. I think that Congress is very fortunate; I think that the American public is very fortunate; and I think that the railroads are very fortunate that he is here. I do not agree with everything he does, but I absolutely approve his bold, courageous plan of exploring the law and making suggestions.

I think that progress is made in this world by men who do go too far and who blaze the trails, and we have not got to agree with everything they do; but it is proper to understand the way this develops.

Mr. HUDDLESTON. I think that if you insist on going into the history, and philosophy of the bill, we will understand your views better—if you will tell us what the origin has got to do with the bill; what jermaneness has it? I can understand your views better if I know that.

Mr. POTTER. I am influenced in that regard by the effect that 90 per cent of what has been said by way of reasons, which this bill should be passed, is an argument repeated time and time again to the effect that this bill is not intended to effectuate any change of the law; it is stated, restated, and reiterated, by Commissioner Eastman, Doctor Splawn, and even by the chairman, that the Congress in 1920 intended to give the commission express and exclusive control of all forms of unification. The thought behind that is that the act of 1920 did not effectuate the congressional intent and this bill is presented for the purpose of doing that.

Mr. HUDDLESTON. Just what difference does it make what was the intent? We draw the intent of the bill from the bill. What may have been in the mind of the parties who were interested then is not of interest to me now, may I say?

Mr. POTTER. Well, I say, Commissioner Eastman and Doctor Splawn discussed the origin for hours, and it seems to me relevant and appropriate that I should discuss it.

Mr. HUDDLESTON. If they discussed what was in the mind of somebody not expressed in this bill, I did not get it, I should have made the same observations then I am making to you now. I am not interested in what anybody had in mind. I am interested what is the significance of the bill, and what purpose it will accomplish.

Mr. MAPES. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. Without any question as to its germaneness, did I understand you to say that the idea originated in Mr. Eastman's mind in 1920?

Mr. POTTER. Yes.

Mr. MAPES. He has been a long time getting it before the committee?

Mr. POTTER. I think it is proper to restate the history of it. I think I should state those facts.

Mr. HUDDLESTON. Where did he get it?

Mr. POTTER. I beg your pardon.

Mr. HUDDLESTON. Where did Mr. Eastman get it?

Mr. POTTER. Where did he get the idea?

Mr. HUDDLESTON. Yes; where did he get the idea?

Mr. POTTER. I do not know just where he did get the idea.

Mr. HUDDLESTON. We have had ideas on railroad consolidation confronting us in one form or another ever since we have had railroads.

Mr. POTTER. I do not care to press this. I do not care about being heard Mr. Chairman, on the bill.

The CHAIRMAN. We are discussing a question of which you know considerable. The committee knows that you are a man of knowledge, and we would like to hear you, get your reaction on this bill, and any suggestions that we might make is not for the purpose of trying to take you off of the floor at all. It is certainly not in the mind of the chairman or of any member of the committee, and I can say this to you, since you have said some nice things about Commissioner Eastman, I have heard him say many about you.

Mr. POTTER. If there is any one person who has any right to comment on Commissioner Eastman's ideas, I am that person. I am sure that there never was a man who sat on the Interstate Commerce Commission that agreed with him on as many things as I did, and as I do, and I think that he will say that.

I do not care to go into this, Mr. Chairman, at all, unless you think that it is relevant, but there are some pretty serious aspersions here.

We all know how a little misstatement or spark may be fanned into a very serious conflagration. We all know that just a few days ago, in the Senate, the King resolution was offered quoting Commissioner Eastman as saying these holding companies were acting beyond the law, and outside of the law, and in violation of the law, and that resolution was passed, and the matter was referred to the Attorney General to see whether they were violating the law, and I think it is proper here to discuss the question as to whether these holding companies are violating the law or not. I do not care to discuss that at all, if you do not want to hear it.

The CHAIRMAN. Proceed, Mr. Potter, if you desire.

Mr. POTTER. I will then abandon and surrender the few moments of time in which I hoped to answer what Commissioner Eastman and Doctor Splawn were given days to say.

The CHAIRMAN. We certainly, Mr. Potter, are not assuming that attitude, for the simple reason that anything they said in support of this bill, any witness can come before this committee and should have the opportunity to reply if he wants to, if he does not agree. That is why we asked you to come here, and that is why Judge Heiserman and Mr. Fitzpatrick are going to be here. They have some views that they are going to express on this bill, and we know that you are a man that has views and they should be well-matured views, and intelligent views, and we would like to hear you.

Mr. POTTER. Well, the fact that there has been discussion and it has been discussed before this committee for hours and days, the proposition that this bill is essential to effectuate the original intent of the law, that statement I deny emphatically, and I am here to prove that it is wrong.

The CHAIRMAN. Well, go right ahead.

Mr. POTTER. I am here for the purpose of proving that it completely reverses the intent of the law, and does not effectuate the original intent of the law at all, and I am here to prove that out of the mouths of the members of the Interstate Commerce Commission, and I would like to read everything that has been said to call your attention to it, that has been said by Commissioner Eastman and Doctor Splawn, about the intent, and then I would undertake to show that there is not the slightest foundation for any part of it.

As to the intent of the Congress in passing this law, that arose very prominently after 1920, and it was raised by Commissioner Eastman quite properly. The first case that came up was known as the Valley Railroad case. In that case the commission just recognized the question as existing as to whether or not the intention was to give the commission exclusive control of the subject of unification.

The question which has been urged here was the intent of Congress. The commission did not pass upon that question.

Then, in 1921, in the Denver & Rio Grande case, reported in 70 I. C. C., 202 the question arose again. That was a case where the Denver & Rio Grande property had been sold in foreclosure and had been bought in by a committee representing the bondholders. The bondholders were a holding company. That holding company also owned the Western Pacific Railroad. The application before the commission was for the new company to issue its stock to this holding company. Commissioner Eastman raised the question that that could not be done without the consent of the commission. The application was one under 20a for leave to issue securities. The commission decided that question against Commissioner Eastman's contentions. And it held that section 5 did not apply at all to holding companies. It held that section applied only to acquisition by one railroad of another, and as it was a holding company, not a common carrier, who made this acquisition, the holding company was entitled to take charge of this property, and that the law did not apply to it at all.

Mr. HUDDLESTON. What was that case?

Mr. POTTER. The Denver & Rio Grande, decided July 11, 1921, reported in 70 I. C. C., at page 102.

There you had a clean cut, positive, absolute statement that this law was not intended at all to restrict holding companies.

A statement by the commission, with which Commissioner Eastman did not agree——

Mr. HOCH. Did the commission say that it was not intended to apply, or did not apply?

Mr. POTTER. Not intended to apply.

All of these cases, in all of them, the question is one of intent, and in every one of these cases the question of intent was what was dealth with.

Commissioner Eastman was arguing as to the intent of the law, and if the commission had agreed with him as to the intent of the law, this bill would not have been necessary.

Mr. BULWINKLE. In any case subsequent to that, has the commission reversed itself on that question?

Mr. POTTER. No, sir; it has not.

I will come to a rather interesting phase of that later.

Mr. MAPES. I do not want to interrupt your trend of thought, but I shall like to ask if you are referring to the intent of the law or the intent of Congress in passing the law?

Mr. POTTER. That question never has been raised until within the last year or two years.

Mr. MAPES. The question of intent of Congress has never been raised?

Mr. POTTER. No, sir; not as distinguished from what it did. Everybody conceded that the bill accomplished whatever Congress intended to accomplish, and if the commission had found that the intent of the law was to take jurisdiction over holding companies, it would have taken jurisdiction and this bill would not have been necessary.

That question is running through all of these cases.

Mr. HUDDLESTON. Mr. Potter, as I get this Denver & Rio Grande case, the commission discusses the law and states:

> The holding company is neither a carrier subject to the act, nor organized to engage in transportation subject to the act.

Mr. POTTER. Mr. Huddleston, the decision was a clean-cut decision by the commission that the holding company had a perfect right to acquire control of the railroad without coming to the commission.

Mr. HUDDLESTON. Because a holding company was not forbidden by the act to do so?

Mr. POTTER. Right; therefore, when in 1928 these holding companies were formed they were doing exactly the thing that the commission told them in 1921 that they could do.

Mr. HUDDLESTON. The commission told them that the law of 1920 did not prohibit them from doing it?

Mr. POTTER. That is right. It told them that the law of 1920 permitted that to be done, and they did it.

Mr. HUDDLESTON. I do not think that it is fair to say that the law "permitted" it to be done. The law did merely not include them within the prohibitory clauses.

Mr. POTTER. It certainly does not, and it operates——

Mr. HUDDLESTON. It does not contain any express "permission" for them to do that.

Mr. POTTER. Then, it seems to me it is not out of place to inquire, whether, in fairness, a sense of fair play, should not have protected these holding companies against condemnation as trying to evade the law, and violate the law, which has been said here.

The Denver & Rio Grande case was an absolute approval and authorization of everything that has been done by these holding companies.

Mr. HOCH. Let me see if I get you correctly on that. You are contending that there was no prohibition in the law against any unification by holding companies; that there was nothing in the transportation act which prohibited unifications by holding companies?

Mr. POTTER. I do not know as I get your point, Mr. Hoch.

Mr. HOCH. It is on the point that Mr. Huddleston asked. As I understand, your view is that decision—and I am not familiar with it right now, although I think that I read it at the time—your view is that that decision simply held that the transportation act did not specifically include holding companies within its terms, and all the decision stated was that the transportation act applied only to acquisitions by one carrier of control of another.

Now, do you contend that there was anything in the transportation act which altered any law existing prior to the transportation act under which any of these controls by holding companies might have been held to have been unlawful?

Mr. POTTER. I do not know as I want to answer that question.

What I do want to say is this: The Interstate Commerce Commission held that the Western Pacific Holding Co. had a perfect, complete, actual, legal right to acquire control of the Denver & Rio Grande road, without coming to the commission and so held that the Pennroad Co. and the Van Sweringen companies had a perfect right, seven years later, to form their holding companies without coming to the commission. That is what I want to clear up.

Mr. HOCH. Did they attempt to pass on the question as to whether any violations of the antitrust laws existed; did the commission assume to pass on that question in any of those decisions, as to whether there was involved any violations of the antitrust laws, or were they simply passing on the question of whether holding company acquisitions were in the purview of the law?

Mr. POTTER. That was the only question.

Mr. HOCH. Well, is there not a very clear distinction between those two questions? I am not attempting to argue with you. I simply want to get it clear as to whether you recognize that there is a distinction between those two questions.

Mr. POTTER. But the present bill does not say anything about that feature.

Mr. HOCH. I am not talking about the present bill. The present bill certainly is attempting to make a change, but I am talking about what you are talking about.

Mr. POTTER. Again, I do not want to be persistent, but I would like to develop each stage of this law, as I understand it.

Now, the next case that——

Mr. HUDDLESTON. Referring to that case that you quoted from the commission says, in their opinion:

> Referring to the objections made by the stockholders' committee of the old Denver company, we are of the opinion that the proposed acquisition and operation by the applicant of the properties of the old Denver company are not within the scope of paragraph (18) of section 1 of the act, because such property was in existence and was operated in interstate commerce prior to the effective date of that paragraph. We are further of the opinion that the proposed acquisition of the applicant's stock by the holding company does not constitute a consolidation of the property of two or more carriers by railroad, subject to the act into one corporation for the ownership, management, and operation of properties theretofore in separate ownership, management, and operation, within the meaning of paragraph (6) of section 5 of the act.

That was the reasoning and conclusions upon which was based the decision that this holding company actually was not forbidden by the Interstate Commerce act.

Mr. POTTER. And that, Mr. Chairman, was the reason and the conclusions why the Interstate Commerce Commission should have said and now say that the holdings of these present holding companies are strictly within the law.

Mr. HUDDLESTON. They have never said that before, Mr. Potter.

Mr. POTTER. That is the fact.

Mr. HUDDLESTON. They have merely said that it was not forbidden by this section referred to.

Mr. POTTER. In other words, the law sanctions it and authorizes it, and that is all I am saying.

Mr. HUDDLESTON. Very well, sir. You may proceed with your next point.

Mr. POTTER. The next case was the Pitttsburgh & West Virginia case. Now, bear in mind we were arguing all through here the question whether the intent of the law was to make exclusive jurisdiction of this subject.

Mr. GARBER. Will you kindly cite the volume and the page?

Mr. POTTER. The Pittsburgh & West Virginia is 70 I. C. C., 682, Finance Docket No. 1108, decided December 10, 1921.

In that case the companies had proceeded on this theory that the transportation act did not compel them to come to the commission for approval; they proceeded on the theory that the State laws were still in effect.

Then they entered into a consolidation agreement, and they went to the State officials, obtained the necessary approval for the consolidations, and the consolidation became effective under the state laws, and they then came to the commission under 20a for leave to issue their securities. Under 20a securities could be issued only for lawful purposes, and as these people had not come before the commission for authority to consolidate, there was raised the question as to whether the issuance of securities was for a lawful purpose.

Commissioner Eastman was on one side of that controversy and division 4 sustained him and held that the effect of the transportation act was to nullify the State laws, set them all aside, and as they had not come to the commission for permission to consolidate, they had to stop and could not be allowed to issue the securities. That was a complete victory for what I will refer to here as the Eastman view, because, frankly, he always led us in that view.

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Mr. HUDDLESTON. He did not lead you in that particular decision, it seems.

Mr. POTTER. No.

Mr. HUDDLESTON. You were the dissenter?

Mr. POTTER. Yes, sir. When that case was decided, by the way, Doctor Splawn says that the commission answered my argument. That is not quite right. I did not make any argument. Frankly, at that time, Commissioner Eastman had outthought me.

Mr. BECK. What?

Mr. POTTER. Outthought me. I was simply shocked and stunned by the idea that the purpose of the transportation act was to nullify all of the State laws and set them aside. I could not believe it. But all I did was to be noted as dissenting.

And what happened after that decision, Mr. Chairman? Several things happened, promptly. In the first place, the Pittsburgh & West Virginia Co. applied to the commission for leave to have the case reheard before the full commission, and that application was granted. And the granting of that application, the effect of it, was to set aside the decision's decision.

The second thing that happened was, the commission having said it was their duty to come to the commission for permission to consolidate, the company filed a new application, and asked the commission to give them permission to consolidate.

By that time this question as to the scope and intent of this law had attracted a great deal of attention in the commission and out of it, so much attention that the commission decided to bring in the public to discuss the purpose and intent of the law, and it instituted a new procedure, called Ex Parte 81, and set those three proceedings for argument before the full commission.

In due course, the commission decided, and decided in a very queer way. It referred to the fact that the correctness of the decision of the division had been challenged. It referred to the point raised, and then the commission said it would not pass on that question.

It just plainly ducked it, if you please, and it decided the case on a question of value, leaving that main question in the air.

Thereupon Commissioner Daniels and Commissioner Potter dissented, because the commission had ducked and left this important question undecided.

Commissioner Eastman concurred in the decision, but he expressed regret that this very important question was left in the air, undecided.

So, you have there testimony of three men to the effect that the original decision that was in favor of the Eastman view, had been set aside. And it never was restored.

In a later case Commissioner Eastman referred to the fact that the first decision, the division's case, had been reversed by the full commission.

And that brings us to the misunderstanding that Doctor Splawn has. Doctor Splawn in his argument here said that the original division's decision in the Pittsburgh & West Virginia case, from that day to this, has given the commission's interpretation as to the intent of this law, although Commissioner Eastman is on record as saying that that decision had been squarely reversed.

Mr. BECK. Had been what?

Mr. POTTER. Had been reversed.

Now, along about this time, several things happended.

The transportation act not only had section 5, but it amended section 1 and it put in section 1 a provision designed to assist railroads by authorizing them to abandon railroads wherever the commission found that they were not necessary. A very sweeping provision apparently applying to intrastate as well as interstate railroads.

Under that section of the law a Texas railroad——

The CHAIRMAN. Mr. Potter, you may sit down, if you prefer. Most witnesses prefer to sit down, and do.

Mr. POTTER. Thank you.

In that provision of the law a Texas railroad applied to the commission for leave to abandon, and the commission issued the certificate.

The State of Texas promptly raised the question as to whether Congress had that power to nullify State laws. And they took the question to the Supreme Court of the United States, and the Supreme Court of the United States held that the commission had no power to authorize the abandonment of a State railroad, as that was an intrastate question, and from that day to this, whenever the commission has been called upon to authorize the interference with a purely State railroad, it has always limited its decision to interstate commerce.

That decision had a very profound impression on the commission. The commission took note of the fact that it must be pretty careful in construing too literally the broad, sweeping provisions of the law, nullifying State laws, and then, what happened?

The application of the Texas railroad to the commission was reported in 65 I. C. C., 436, and the decision of the Supreme Court on that case, setting aside the commission's action was reported in 258 U. S., 204, decided March, 1922.

It was after the Supreme Court had passed on these Texas cases that the commission reheard the Pittsburgh & West Virginia case, and in effect left the decision in the air.

Now, the next case that is of interest is the Nickel Plate case. The New York, Chicago & St. Louis Railroad Co. (79 I. C. C., 581), decided June 18, 1923. There was a case where the Nickel Plate Railroad wanted to consolidate with the Clover Leaf, and two or three other railroads. They evidently examined the law and concluded that it was not the intention of the Congress to give the commission exclusive jurisdiction over all unifications and not the intention of the Congress to require all such matters to be brought to Washington.

They concluded that the State laws were still in effect, and what did they do? The Nickel Plate Railroad runs through the States of New York, Ohio, Indiana, and Illinois. They entered into a consolidation agreement under the laws of those States. They applied to the officials of those States for authority necessary to effectuate those consolidations. Then they came to the commission under 20a as they had to do, for leave to issue the securities, although they had not come to the commission for leave to consolidate at all.

The case was referred to one of the commission's examiners, in the ordinary course, Examiner Bowles. Examiner Bowles knew of this question being passed back and forth in the commission for decision. He was sympathetic with the Eastman view and he came forward

with a report, a tentative report, in which he recommended that the commission make a finding:

> It being the intent of Congress that complete control of consolidations should be in our hands, and Congress having prescribed the manner in which the consolidations are to be effected, we are not at liberty to admit consolidation in any other manner, and consolidations can not lawfully be accomplished without our authority under the provisions of section 5 of the interstate commerce act.

A complete application of the Eastman view.

And what happened?

Mr. MAPES. What was the date of that, Mr. Potter?

Mr. POTTER. The date of the report—well, I do not have the date of the report. The date of the decision was June 18, 1923. There, you had the issue right squarely drawn. There you had presented the question exactly that is now said by Commissioner Eastman, and Doctor Splawn, and the chairman, was the original intent of the transportation act. The question was discussed fore and aft, before the commission.

The final result of that discussion was a dissent by Commissioner Eastman when the case was decided against him, eight pages long, and in that dissent, he said everything about the intent of the commission, that he had told you gentlemen everything and the commission decided squarely against him.

Mr. SHALLENBERGER. The intent of the commission or the intent of the Congress?

Mr. POTTER. Intent of Congress.

And following the commission's decision and his dissent, and as the result of that decision the commission allowed the securities to be issued, and the Nickel Plate Railroad to-day exists legally because this commission did not agree with Commissioner Eastman as to the intent of the law.

The CHAIRMAN. Mr. Potter, do you think or are you arguing that it was not the intent of Congress to empower the commission to veto or approve an application for a consolidation?

Mr. POTTER. I am arguing only that the State laws continued to be effective after the date of the transportation act, after it was passed, that the commission so held; that carriers do not have to come to the commission unless they wanted to.

The CHAIRMAN. For what?

Mr. POTTER. I am arguing to the proposition that there was nothing in the law which forbade anything. Every word and every letter was a grant of power. I am arguing that power of the law was to lessen relaxation of the grip of regulation, not increase it, and I would like to develop that more intensively, when I get to it.

The CHAIRMAN. As to consolidations?

Mr. POTTER. Yes, sir.

And on the soundness of that proposition and on my ability to convince you gentlemen of that, I will rest this entire case.

And I fought that question over with Commissioner Eastman for five years, and I know what I am talking about.

Now, the Nickel Plate case, was decided five years before 1928. The people who formed these holding companies waited five years to put the holding companies through, after the plan had been approved, in their own Nickel Plate case. They waited until everybody was doing it.

The boom times came on. The expansion had set in, 1924, 1925, 1926, 1927, and 1928; everybody was talking about big things, and doing big things. They put these holding companies through and we are told that they resorted to trickery, deception, concealment—employed astute, crooked lawyers to do this thing, when the commission had told them that they could do it. There is no occasion for that at all.

Mr. NELSON. I do not get that. When did the commission tell them that they could do those things? When did it tell them that they could acquire roads in competition with their road, through holding companies?

Mr POTTER. They could do what?

Mr. NELSON. You said that they waited five years after the commission had told them that they could do that. Could do what?

Mr. POTTER. After the commission had told them that they——

Mr. NELSON. I am just talking about that feature, about a case that deals with a union under the State laws. You are referring to that.

Mr. POTTER. Yes, sir.

Mr. NELSON. That does not apply to holding companies under which they are required to do certain things? That is not done under the State laws. That is done through holding companies.

Mr. POTTER. I am discussing now, Mr. Congressman, solely the intent of Congress to bring in all of these questions, and what I say is that it was the intention of Congress to leave to the companies all of the power that they had under the State laws.

Mr. NELSON. Railroad companies?

Mr. POTTER. Yes, sir.

Mr. NELSON. What has that got to do with what holding companies are required to do?

Mr. POTTER. In the Denver & Rio Grande case the commission said that the holding company acquisitions were out, entirely outside of the law.

Mr. NELSON. Might not that be true in one case and not in another; might that not be true under one set of facts, where there is no violation of the antitrust laws, and absolutely the reverse under another set of facts?

Mr. POTTER. Well, I do not know that I follow you.

Mr. NELSON. I do not think that I follow you.

You quoted that case which had to do with a certain set of facts, and on that basis you are justifying subsequent holding companies and their activities, no matter what they may be, or what they are attempting to accomplish. Does that necessarily follow?

Mr. POTTER. Well, I do not know that I quite follow that. I do not think that I say that.

Mr. NELSON. I think that you did a few minutes ago.

Mr. POTTER. I did not intend to.

Mr. NELSON. Probably you did not intend to.

Mr. POTTER. What I was trying to say was that the Congress, the commission, has held that the purpose of the law was not to give to the commission the exclusive control of unification.

Mr. NELSON. Yes.

Mr. POTTER. That is not to set aside the State laws.

Mr. NELSON. But, it did not suggest, did it, that through holding companies you could violate the antitrust laws?

Mr. POTTER. Why, no. Not at all.

The Northern Securities Co. case held that.

But, this is not that case. The bill here does not proceed on the theory of preventing a restraint of competition. This bill says that if a half a dozen people own a railroad 10 miles long in Maine, they shall not be allowed to purchase a railroad 10 miles in California, entirely irrespective of competition. The theory of this bill is that the power to affect interstate commerce, gives the commission the power to say who shall own the railroads. That is what this bill does.

Mr. SHALLENBERGER. Mr. Potter, I would like to get one thing clear in my mind. Do you hold that the commission decided that it was not the intent of Congress in this act to put the consolidations of companies engaged in interstate transportation, wholly under the control of the Interstate Commerce Commission?

Mr. POTTER. Yes, I do.

Mr. SHALLENBERGER. That was not the intent of Congress at all?

Mr. POTTER. No; that was not their intent. I think that is clear.

Mr. SHALLENBERGER. Well, what is the use of coming to Congress, if you can consolidate without its consent; what is the use of Congress making a futile gesture?

Mr. POTTER. Not at all.

Mr. SHALLENBERGER. They can consolidate without the consent of the commission, as I gather from your argument.

Mr. POTTER. That brings us right back to the whole effect of section 5.

Mr. SHALLENBERGER. Of course, I do not have a very good opinion of the judgment of the commission, if that is what they decided.

Mr. POTTER. Let us discuss that, Mr. Chairman.

Mr. HUDDLESTON. I think it is important here.

Mr. POTTER. That comes right back to the whole question of the purpose of section 5 of the law.

There was a need for assisting the railroads when they came out of Federal control. Congress wanted to assist them in the matter of increasing rates; it wanted to assist them in the lessening of regulation, and it passed section 5.

Now, let us consider what that section did, paragraph 5.

In the first place, it restored to the railroads the right to pool. The original interstate commerce act, in 1887, forbade that.

Mr. SHALLENBERGER. Within the control of the commission; right to pool within the control of the commission?

Mr. POTTER. It is, since 1920.

Mr. SHALLENBERGER. That is what I mean.

Mr. POTTER. Prior to 1887 the road had a right to pool; that right was taken away from them by the Interstate Commerce act of 1887. It was restored by the act of 1920. The purpose of that was this: When railroads were given the right to agree among themselves, for a division of traffic, and earnings and thus had their revenues protected, they could get together and put in effect economies of operation.

Now, paragraph (1) simply restores that right to pool. That clearly was a lessening of restriction upon the carriers, something that the carriers wanted.

That was in paragraph (1). The next thing was paragraph (2), which authorized the commission to permit one carrier to acquire another. That was a plain grant of power.

Mr. SHALLENBERGER. Why was that necessary; that is what I am trying to get at. Under your contention they had a right to do so, why should Congress enact this law; why pass it?

Mr. POTTER. It was necessary for this reason: Various States had statutes, State antitrust laws. The United States had the Clayton Act and the Sherman Act. There had to be relief for the railroads.

Mr. SHALLENBERGER. Now, right on that point, which Mr. Hoch brought up, the provisions wherein these corporations are relieved from the antitrust laws. You evedintly believe that this is done, that the carriers can consolidate without the consent of the Interstate Commerce Commission, under this act. That seems to me to be a serious defect.

Mr. POTTER. That is the whole point of the case.

Mr. SHALLENBERGER. That is what I want to know about.

Mr. POTTER. The point is, wherever roads under the State laws can consolidate, or do anything else without clashing with the antitrust laws, they do not have to come to the commission.

Now, the effect of that law was to grant immunity from those antitrust laws. There was nothing cut off of the right that a carrier had before that, and that is all.

Mr. SHALLENBERGER. And, they were relieved of the necessity of getting the consent of the Interstate Commerce Commission?

Mr. POTTER. Right.

Mr. SHALLENBERGER. Well, they have not got consent under consolidation which you are discussing.

Mr. POTTER. No; I am discussing the question as to whether the paragraph (2) was a new proposal. I say that it is a plain grant of power, nothing else.

Now, coming to paragraphs (4), (5), and (6). There is not a word in those paragraphs which says that the roads shall not consolidate. There is not a word that savors of anything except a grant of power. A grant of power adding to the power under the State laws.

There are 48 States. They all have laws, on consolidation. It was a very complicated thing to consolidate under that system, although it was done in the Nickel Plate case with four States, and done very well, but the Congress wanted to make that easier, and what did the Congress do? The Congress said, here, we will let you go ahead and consolidate all you want to, provided you conform to certain restrictions. We want all of these consolidations, if you elect to make them, we want them all to be under a general plan; but if you will conform to a general plan, laid down by the commission you can go do anything you please, and in that event we will grant immunity from the State laws.

There was nothing whatever taking control of the entire subject. It was simply a grant of power. And the commission so held.

Mr. GARBER. There was no authority to effect any consolidation prior to the adoption of a plan, was there?

Mr. POTTER. Well, that is a moot question.

Mr. GARBER. Why should not that be a mooted question, in plain view of the law, which specifically states that the consolidations must be in conformity to the plan adopted?

Mr. POTTER. Well, you are probably right about that, although there was a discussion on the commission, as I recall, to the effect that the consolidation plan could be adopted in a sort of piecemeal fashion.

Mr. GARBER. Well, paragraph (A) of section 5 at page 20 of the transportation act reads:

> The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the commission.

Mr. POTTER. Well, I grant you that. I will grant you that.

The CHAIRMAN. Grant what?

Mr. POTTER. If it had to be approved by the commission, if they wanted to take advantage of the commission's authority, but if they had a right under the State law, they could go ahead under the State law.

Mr. GARBER. Were they authorized under the State laws to consolidate?

Mr. POTTER. Every State has laws on the subject; every State in the United States has elaborate statutes on consolidation of railroads.

Mr. GARBER. Whether or not it has any relation to interstate commerce?

Mr. POTTER. Yes, sir; the Nickel Plate case did that exactly. They did it under the laws of New York, the laws of Ohio, Indiana, and Illinois, all covering the subject of consolidation, and they entered into a consolidation agreement under the laws of all of those States, and put their consolidation into effect, and the commission held that they had a perfect right to do it.

Mr. GARBER. You mean to say that the State law would have preference over the Federal act here in reference to interstate commerce in regard to consolidations?

Mr. POTTER. I say there was no prohibition in the Federal act at all.

Mr. GARBER. Well, here, I just read you a prohibition in regard to consolidations.

Mr. POTTER. That was only after the plan was put through. That was after the plan was put through.

Mr. GARBER. After the plan.

Mr. POTTER. Yes.

Mr. GARBER. No; it was adopted at the time the act was enacted.

Mr. POTTER. No; not the consolidation plan, was not adopted, has not been adopted yet.

Mr. GARBER. I am talking about before any plan was adopted by the commission.

Mr. POTTER. Well, I do not know as I understand you.

Mr. GARBER. There was no authority anywhere for interstate roads to consolidate, except on the approval of the commission after the act of 1921.

Mr. POTTER. Why, Mr. Congressman, the commission itself held exactly the contrary in 1923 in the Nickel Plate case. There is a mass of misunderstanding with regard to that.

The commission itself held, three years after the transportation act was enacted, that the State laws were effective to consolidate, as to consolidation, and allowed the consolidations of the Nickel Plate Railroad, running through four States.

Mr. SHALLENBERGER. What was effected under the State statutes. You hold that set-up a plan under the language of the Federal statute?

Mr. POTTER. There is no plan in the language, or any language, in connection with that plan.

Mr. HUDDLESTON. Mr. Potter, let me see if I understand your position correctly. Prior to the transportation act of 1920 there were certain prohibitions in State laws and the Federal laws against consolidations.

By the act of 1920 those prohibitions were lifted in certain specific cases, which involved approval of it by the Interstate Commcere Commission.

Prior to 1920, certain consolidations, interstate and intrastate, might have been effectuated without violating any law, and as to those consolidations the carriers have the same rights and prerogatives, after the passage of the act of 1920, as they had before. In short, the act of 1920 merely lifted certain prohibitions and did and the adoption of the nation-wide plan of consolidations did not interfere with the rights of the carriers existing prior to the statute of 1920 to consolidate, although not in accordance with that plan.

That is your position, as I understand it?

Mr. POTTER. Yes.

Mr. HUDDLESTON. May I say I agree with you as to the effect of section 5.

Mr. POTTER. Well, I do not know, gentlemen, that it is possible to discuss this any further. I do not care to take the committee's time. I feel very strongly about this question, but I do not want to be a reformer, and I think it is quite evident that anything that I can say will leave——

Mr. SCHALLENBERGER. I would like to ask one more question.

Do you hold that if the Congress decides that it had not legislated sufficiently, that we find that the law is not tight enough to absolutely control consolidations, and Congress discovers that they have been acting under State laws, as you have indicated, to effect consolidations, would you object, now, to us undertaking to correct that in this law?

Mr. POTTER. No; I would not.

Mr. SHALLENBERGER. But, you do not want to upset the consolidations that have been formed?

Mr. POTTER. Right. I think so. There has got to be a very clear distinction between the power of the Federal Government and the power of the States in that regard.

The Congress undoubtedly has a perfect right to forbid interference with competition. It has a perfect right to pass laws to protect the functioning of Interstate Commerce agencies. It has a perfect right to do what it did in the Northern Pacific case, to say that the Northern Securities Co. could not combine the ownership of the two lines, because the effect of that necessarily was to restrict competition.

Congress undoubtedly has the right to do anything of that sort.

Where I object to this bill is just this, Mr. Chairman: You are not regulating interstate commerce at all. No, you are not regulating the railroads. You are interpreting the Constitution of the United States, and if you pass this bill you are doing it not on the theory it is necessary to restrain interference with interstate commerce; not on the theory that it is to prevent interference with commerce, but

you are doing it simply because you believe in the broad principle that the power to regulate commerce also gives Congress power to regulate the ownership, gives to Congress the right to say who shall own that agency. You can not do that. You may do anything you please as to regulating the functions of the agency, but you may not say who shall own it, and if you do, let me tell you what will happen. Again I say, you are not merely legislating in regard to railroads, when you say that the power to regulate commerce gives you power to regulate anything that affects commerce, the ownership of the agency; or gives Congress the right to say who shall own the agency. You are committing yourselves to the proposition that the Congress has the right to say who shall own the oil wells in Texas, because they have the power to affect competition; you are saying that the Congress has the right to say who shall raise hogs, and what kind of hogs, what breed of hogs, in Iowa, because the farmer has the power to affect interstate commerce. You are saying that the Federal Government has the right to say who shall own the automobile factories in the country; that is what you are doing here. That is what I think.

Mr. HUDDLESTON. May I ask you a question?

Mr. POTTER. Yes, sir.

Mr. HUDDLESTON. Is it your view, as I understand, that Congress may regulate the instrumentalities of commerce, but may not regulate the agencies engaged in commerce?

Mr. POTTER. My view is it may, in the broadest way, regulate the functioning of the agency, and do whatever is necessary in order to prevent interference, but when you come to saying that merely because ownership gives the power to regulate, that the Congress may say who shall own and who shall not, that, you can not do. It is attempting to do that that is so disturbing to me about this bill.

Mr. HOCH. You agree, of course, that the transportation act does at least attempt to give to the commission the supervision of control of one carrier by another, regardless of whether that control constitutes restraint of commerce?

Mr. POTTER. It does not give to the commission any exclusive control at all. That is my interpretation of the law, and that is what the commission has held after 5 years.

Mr. HOCH. I do not quite understand what you mean in that connection, by saying that it does not give exclusive control. It does provide, does it not, that before one carrier can control another carrier it must secure the approval of the commission?

Mr. POTTER. That is exactly what it does not do, Mr. Hoch.

Mr. HOCH. Well, I wanted to get your view.

Mr. POTTER. That is exactly what it does not do; no, that is exactly what it does not do. And, it seems to me that the time has come to understand that fact.

Mr. HOCH. You mean to say that the transportation act does not provide that consolidations, directly, of two or more carriers, must not be effected without supervision of the commission?

Mr. POTTER. It does not say that.

Mr. HOCH. What does it say; can you tell us, in a word, what it says on that?

Mr. POTTER. Yes.

It says that for the purpose of being helpful to carriers the Interstate Commerce Commission is given certain powers to lessen regulations and restrictions. It may give its approval to consolidations, not exclusive of anyone else, but it may give its approval, provided they will proceed in a certain way; but if the carriers do not want to proceed in a certain way, there is no power whatever in Congress to compel it.

The idea of compulsory consolidations were discussed when the transportation act was enacted, and was discarded, and Commissioner Eastman has said over and over again here that after the commission puts out the plans the roads do not have to go ahead unless they want to.

Mr. HOCH. I am not talking about whether the roads have to go ahead. The commission has promulgated certain plans. Now, do you contend that there is any power in the railroads, two or more of them, to consolidate directly without the approval of the commission?

Mr. POTTER. Well, I think that—I do not know the exact status of the commission's proceedings. If it is true that the commission has promulgated a complete plan, yes, I would say that does not bar the State laws.

Mr. HOCH. It does not?

Mr. POTTER. I would say so.

Mr. HOCH. And that they——

Mr. POTTER (interposing). I think that that is the logical effect of the commission's decision.

Mr. HOCH. And they can go ahead and consolidate under the State laws, entirely disregarding the language which Judge Garber read you a little while ago?

Mr. POTTER. I do not want to get into any deep water on this.

Mr. HOCH. We are already in deep water, are we not? We want to know where we are going in this deep water.

Mr. POTTER. I do not think that is a question that we should discuss.

Mr. HOCH. That question is plainly before us in this bill. Now, if it is true that Congress has attempted to give to the commission the power to control consolidations, directly between two or more carriers, the question is here whether that same control should be extended to an indirect control of two or more carriers, by a holding company or other device. How can we escape that question? You say that it is not here. It seems to me that it is, and is one of the principal questions before us.

Mr. POTTER. Perhaps it is here. It is a very difficult question. It is one thing to regulate the agency, and what the agency shall do, and it is a very different thing to regulate the functioning of an instrumentality which does not carry on or engage in commerce, such as a holding company.

Mr. HOCH. Certainly it is a very difficult thing that is involved. It involves a constitutional question to be sure, but the question is here just the same.

Mr. POTTER. Well——

Mr. HOCH. Now, on that question, if it will not divert you, on this question of whether the transportation act sets aside State laws, or authority, you made reference to the Texas case, and I think it would

be pertinent to put in a paragraph here from that case. That case I have before me. It was the case of a carrier that was solely an intrastate carrier. It owned and operated a line, 30 miles long, wholly within the State of Texas. It did, of course, handle some interstate traffic, performed some interstate service, and the paragraph of the decision is as follows:

> These discussions persuade us that the paragraph in question; that is, the transportation act—should be interpreted and read as not clothing the commission with any authority over the discontinuance of purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by the continuance of that business.

Apparently that is all that that case decided. Here was an intrastate carrier handling some interstate business. But the court held that the question of whether that intrastate line was to be permitted to continue or not under the State order did not involve any question of imposing any burden upon interstate commerce as such, and that therefore the court held that the transportation act should not be interpreted to extend the power of the commission over that kind of a case.

Mr. POTTER. Well, the court held that the Congress had not any right to deal drastically and arbitrarily with the State agencies. That is what it held. But it held that it could regulate, the commission could regulate the functioning of the agency, but did not say that this agency would have to go out of business. That is a matter for the State.

I do not think that I care to be heard any further, Mr. Chairman.

The CHAIRMAN. I want to ask you a question. I want to ask you this question: Under the Texas law, can two competing railroads consolidate?

Mr. POTTER. I do not know.

The CHAIRMAN. Well, there is a prohibition against it in the statute.

Now, can two competing railroads in Texas consolidate with the approval of the Interstate Commerce Commission?

Mr. POTTER. I do not know.

The CHAIRMAN. You do not know?

Mr. POTTER. No.

The CHAIRMAN. They are doing it.

Mr. POTTER. Well, as to that, I do not know.

Mr. HUDDLESTON. May I call your attention, Mr. Rayburn, to subsection (8) of section 5, which sets aside all restraints and prohibitions of the antitrust laws, and of the laws of the States in these cases in which consolidations are authorized under section (5).

The CHAIRMAN. That is exactly what I had in mind, and that is the reason I asked the question.

Mr. POTTER. Of course——

The CHAIRMAN. There is a provision in the Texas law, as I remember it, against consolidation of parallel and competing lines.

Mr. POTTER. Well, that is correct.

The CHAIRMAN. I am asking, in view of this provision Mr. Huddleston has just referred to, if they can consolidate with the approval of the Interstate Commerce Commission.

Mr. POTTER. I do not think they could.

The CHAIRMAN. In other words, if a consolidation is proposed and the Interstate Commerce Commission approves, does that not set aside the Texas law, under this act?

Mr. POTTER. Sections (4), (5), and (6) of the bill specifically provide that in doing that and in working out the consolidation plan, competition shall be preserved as fully as possible.

Now, I can not see how, in view of that section, the commission could authorize the consolidation of two railroads competing in an important way in Texas.

The CHAIRMAN. Well, competing in any way.

Mr. POTTER. Yes; that might be.

The CHAIRMAN. Would it be determined on a question of degree?

Mr. POTTER. Yes; I think it would be.

The CHAIRMAN. You do?

Mr. POTTER. Yes.

I think the theory of the law is that in working out the consolidation plan, there must be preserved that degree of competition that the public interest requires. If you have three railroads, between two sections of the country, and two of them are competing vigorously, and if you can dispense with the competition of the third, I think the commission has the right to allow the third and the second to consolidate.

The CHAIRMAN. You think so?

Mr. POTTER. I think so.

The CHAIRMAN. You think it ought to have that power?

Mr. POTTER. Yes; I do. I think that the idea of competition as a virtue has been very much overstressed. I think the whole trouble of the railroads to-day is the competition and wastefulness of competition. I think that is all the trouble with the railroads.

The CHAIRMAN. In some of these acquisitions that have been made, in all of these acquisitions that have been made through the holding companies, do you think competition has been preserved?

Mr. POTTER. Oh, I am not familiar with all of them.

The CHAIRMAN. With the main ones.

Mr. POTTER. Well, I do not know. I am a very earnest believer that there should be a regulation of competition. I think unrestrained competition is just about the worst thing that could happen.

The CHAIRMAN. I quite agree with you, but do you think that there should be unrestrained competition on railroads?

Mr. POTTER. No; I do not; no.

The CHAIRMAN. Where do you think that this power ought to be lodged, to say yea or nay?

Mr. POTTER. Well, I think that the power ought to be in the Federal Government to say what shall or shall not be involved in an undue restraint of commerce. I think that you have got to have your statute. It is a matter, a feature, that belongs to the Federal Government, certainly as this belongs to the State government. I see no reason why the States should not have the right to authorize the consolidations as long as they are purely intrastate railroads. I think the Federal Government must have the right with regard to the interest carriers.

The CHAIRMAN. Well, they do that now, even under the transportation act, unless the Interstate Commerce Commission acts under the laws of those States.

Mr. POTTER. That is the Nickel Plate case. The present law as construed by the commission with respect to the rights of the States to control consolidations.

The CHAIRMAN. But now, what about interstate railroads? The laws of the States cannot control that, can they?

Mr. POTTER. No.

The CHAIRMAN. How must we control that, then, if it is controlled?

Mr. POTTER. The Federal Government.

The CHAIRMAN. And, that would be through the Interstate Commerce Commission?

Mr. POTTER. Yes.

The CHAIRMAN. These, some of these systems have been brought together in fact, without the consent of either any State commission or the Interstate Commerce Commission, have they not?

Mr. POTTER. Yes; and there is nothing in the law to prevent that.

The CHAIRMAN. Well, that is exactly what we are talking about.

Do you think that it ought to be so that they should, without the consent of anybody, any agency of the Government?

Mr. POTTER. Well, I will say this, that I recognize the right of the Federal Government to control that situation in so far as it is necessary to protect the power given to the Federal Government.

The CHAIRMAN. And, protect the public interests.

Mr. POTTER. In a very narrow sense; to protect the right to control interstate commerce. The Federal Government does not have anything like the broad powers the State has. The Federal Government's right is strictly limited to the things which are necessary to protect interstate commerce.

The CHAIRMAN. That is correct.

Mr. POTTER. Yes, sir.

The CHAIRMAN. Now, that is just exactly where I was coming. Therefore, do you believe that without a restraining hand of anybody that the different systems of railroads should consolidate?

Mr. POTTER. Should consolidate?

The CHAIRMAN. Should consolidate; yes.

Mr. POTTER. No; I do not say that.

The CHAIRMAN. Or, come into common ownership, which it appears to me is a consolidation in fact, if not in law.

Mr. POTTER. Well, I can not accept that, that that is the power of Congress. I am perfectly clear that the Congress has no right to say that a holding company or an individual shall not own two railroads, merely because the ownership gives the power to affect commerce. I am sure that there is no such power as that in the commission.

The CHAIRMAN. You do not think that Congress has power to delegate to the Interstate Commerce Commission the power to say that the Baltimore & Ohio and the Pennsylvania Railroad can not consolidate?

Mr. POTTER. No; I do not say that at all.

The CHAIRMAN. Well, what do you say?

Mr. POTTER. But when—and because—you are talking about consolidating, you are talking about something that necessarily—that necessarily affects commerce, but that is not this bill.

The CHAIRMAN. Well, what is the difference between common controlled railroads and consolidated railroads? I mean in fact, I do not mean in law, or some instrument drawn up. I mean, what is the difference?

Mr. POTTER. Between a consolidation and common controlled?

The CHAIRMAN. And a common ownership.

Mr. POTTER. Well, there is all the difference in the world. There is all the difference in the world. When you have a consolidation, the identity of the separate properties disappears. The thing that is considered is what is best for the consolidated, unified property. You necessarily affect commerce. Now, when you simply have a common control, you do not necessarily affect the operation at all.

The CHAIRMAN. You do not necessarily?

Mr. POTTER. No.

The CHAIRMAN. You do though, do you not?

Mr. POTTER. Why, not necessarily.

The CHAIRMAN. Practically in every case.

Mr. POTTER. No; I would not say that. I would not say that at all. I doubt it very much.

The CHAIRMAN. If they are operated, if they have a common control and a common ownership, would you not think that they would be operated for a common purpose?

Mr. POTTER. Not necessarily.

The CHAIRMAN. Well, not necessarily.

Mr. POTTER. No.

The CHAIRMAN. Of course, you can always say that.

Mr. POTTER. It is quite conceivable that a man might own and control a half a dozen properties, and not interfere at all with the management of them.

The CHAIRMAN. Why, certainly. I know that that would not be true in plenty of cases, but you can conceive of cases in which that would be true?

Mr. POTTER. Well, I will concede that.

The CHAIRMAN. What do you mean by that?

Mr. POTTER. That common control gives power, of course, to affect management.

The CHAIRMAN. When you buy end to end railroads or parallel railroads that connect, what effect would that have? Now, I am not talking about railroads east of the Mississippi, or west of the Mississippi, one east of the Mississippi and one west, or one in New England and one in Texas. I am talking about buying properties that join with each other, or that parallel and compete with each other, have been competing with each other, and now you have common control, common ownership, they must have a common cause, because the same man is financially interested in the properties.

Mr. POTTER. The Northern Securities Co. case deals with that situation, it seems to me, completely.

Mr. NELSON. Mr. Chairman, I would like to ask a question.

The CHAIRMAN. Mr. Nelson.

Mr. NELSON. May I ask you this, Mr. Potter: I have been very much interested in your testimony. But, I wonder if I have understood you. As I understand you, you have referred to a case here, passed upon by the commission and the courts, by which was authorized an acquisition of railroads, by holding companies.

Mr. POTTER. Yes.

Mr. NELSON. And you suggested therefore that any acquisitions that have been made by holding companies of railroads since that time, no matter for what purpose or what result, or by what means they were accomplished, are perfectly justified, and we ought to let them alone. Is that correct?

Mr. POTTER. Well, I do not say that. I do say this——

Mr. NELSON. Well, was not that the inference that one might reasonably draw from what you said?

Mr. POTTER. I do not think so. What I say is this, that when the Interstate Commerce Commission carefully considers a situation and says that under a certain given state of facts, it is perfectly proper and legal for men to do certain things, I think that for all time should shut the mouths of anybody and bar criticism of that thing as something illegal, as a device, as a trick.

Mr. NELSON. Just one more question. Then, you go on and cite a case under which the railroads effected a consolidation by taking advantage of the laws of the States.

Now, do you mean to suggest by that that if the commission should find that such a combination was against the public interest and against the best interests of interstate commerce, that the courts would hold that that combination of roads would stand, and that the State laws should take precedence over the Federal laws?

Mr. POTTER. Well, I do not know that I want to discuss that.

Mr. NELSON. Let me ask you another question. To take a specific case, suppose that the Pennsylvania Railroad came in and asked the commission to consolidate with the New Haven, and the Boston & Maine, and the commission refused such consent. Now, under the argument that you have suggested, would you say that it would be perfectly proper and legal, for the Pennsylvania to proceed to take those railroads under the laws of the States, and that it would be perfectly proper for them, failing in that, to organize a holding company, and through control of that company to control these roads?

Mr. POTTER. I would not want to pass on anything like that.

Mr. NELSON. That was what you were trying to convey?

Mr. POTTER. I am not trying to.

Mr. NELSON. If you have not, if you will pardon me for saying it, what are you trying to convey?

Mr. POTTER. I do not know, if I have not made my purpose plain, I can not make it any plainer than it is.

Mr. NELSON. I am trying to find out what your purpose is. Now, the questions I have asked you are pertinent to the inquiry and I am interested in what you say, Mr. Potter. I do not know why you should be peeved.

Mr. POTTER. I am not peeved.

Mr. NELSON. You have submitted yourself here as a witness on a matter of great public interest. We are in earnest and feel a sense of public responsibility. You have suggested certain things, and then when we question you about them, you do not care to answer those questions.

Mr. POTTER. No; that is not it at all. I do not want to answer such questions as you have just asked me, which might involve all sorts of situations, which might arise in litigation hereafter. I do not want to be quoted as having said in some lawsuit in Maine, or

Massachusetts, having some one say that Commissioner Potter said that, said this or that or the other. I do not want to pass on that question.

The CHAIRMAN. Mr. Potter, you are not a commissioner now?

Mr. POTTER. Sir?

The CHAIRMAN. You are not a commissioner now?

Mr. POTTER. No.

Mr. MAPES. Mr. Chairman, I would like to ask Mr. Potter a question. It seems to me that this bill would not be here if holding companies had been or were now under the jurisdiction of the Interstate Commerce Commission. I do not understand that it is very important, as to what the intent of the law is, or what the intent of Congress was when it passed the interstate commerce act. I would like to know, and I would like to have your judgment, Mr. Potter, as a man of experience and a man who has been a member of the Interstate Commerce Commission, whether you think holding companies ought to come under the jurisdiction of the Interstate Commerce Commission and be subject to the control and regulation of the Interstate Commerce Commission, the same as operating companies and railroads are.

Mr. POTTER. Well, my view on that is this, that holding companies ought to be under the jurisdiction of the Congress, with respect to every matter which has to do with interestate commerce. I draw the line—and this is only where I draw the line—I draw the line at stating who should own the agency.

Mr. MAPES. Is your objection to this bill because you think it is unconstitutional, or do you object to it on its merits, quite regardless of the power of Congress to do what this bill contemplates?

Mr. POTTER. I object to it on the constitutional ground. I have more serious objections to it on the ground of expediency. I think the bill would be a disaster. I think it would have a very serious effect on railroad credit. I think that it would practically wreck disaster as to property values. I have positive ideas that on the question of expendiency, quite aside from the constitutional question, that the bill is a most unwise one.

Mr. MAPES. You think that it is unwise, because of the first part of the bill, which puts holding companies under the jurisdiction of the Interstate Commerce Commission, or because of the second part of it which authorizes the Interstate Commerce Commission to divest holding companies of their holdings?

Mr. POTTER. I think both.

Mr. MAPES. Then, you are opposed to it in toto?

Mr. POTTER. Yes; I think this——

Mr. MAPES. You do not think that the committee could perfect this legislation so that it would be acceptable to you?

Mr. POTTER. Well, that may be. I do not know about that. I think it raises a very serious question. Frankly, Mr. Congressman, this is my idea: The bill, as we are discussing it now, is a bill to regulate acquisition of control. No one can acquire something unless some one else surrenders it. There can not be acquisition without a sale, and this bill might just as well be called a bill to prevent holding companies of railway securities selling their holdings to certain people.

Now, considered in that way, the bill would be a very serious restriction on the right of the present holders to sell their properties, and

when you say that present holders shall not sell their properties, to the men who have been doing the big things in recent years, they must be scratched off the list of prospective purchasers, you can not have anything but a very serious effect upon property.

Mr. MAPES. Now, you are criticizing the second feature and not the first.

Mr. POTTER. I intended to criticize the first feature.

Mr. MAPES. What is that?

Mr. POTTER. I intended to criticize the first feature.

Mr. MAPES. I understand that you do not want to subscribe to the statement that holding companies ought to have a free field to acquire competing roads; you do not want to subscribe to that? Now, if you do not want to subscribe to that, have you not got to take the other alternative, that they should be brought under the jurisdiction of the Interstate Commerce Commission?

Mr. POTTER. Well, I do not know. I think that there may be some compensating advantages, perhaps; but I think the idea of disrupting the market, the potential market, for four-fifths of the securities, is a very serious one, particularly in these times. It may be some time or other would be ripe for it, but frankly, I am very much disturbed over the railroad situation at the present time, and I do not believe, personally, this is the time to introduce a disturbing influence in the general situation.

The CHAIRMAN. Mr. Potter, may I say this, for the committee: We believe, that so far as our knowledge goes we recognize that situation. That is one reason why we have sat about six weeks on sections 15a. A great many of the railroads say that it is vitally important and, especially the little weak fellows, that that be revised, 15a, and the committee, if it takes any action in that, will certainly try to be helpful to the country by being helpful to one of its great industries, and this committee has never sat as a committee, in the nature of a court, to prosecute anybody. I do not think that could be laid to this committee at any time and I realize that you, knowing the railroad industry as you do, recognize the precarious situation of that great industry, the railroads, just like every other great industry, is in a precarious condition right now, and that is the reason we are trying to fit in with the laws over here in Congress, so as to get over this time, and I trust that nobody will gain the impression that the chairman of the committee, in introducing bills and having these hearings, wants to punish anybody in the world, but that we like to be helpful to the general situation, and the general situation resolves itself back to what is in the public interest.

Mr. POTTER. Well, I can say, Mr. Chairman, that I am very much disturbed about this bill. I think it is a very unfortunate measure, and this is the first time that I have ever appeared before Congress. I am not here because I am being paid for it. I am here because I think it is a very serious public question which is involved and the responsibility is with you. That is all.

The CHAIRMAN. You wrote me a letter, addressed to me as chairman of this committee, so that I think that I have the right to read a paragraph from it, and ask you if that is your opinion.

I think that the consolidation scheme has turned out to be a terrific mistake and said scheme is to blame for all present railway ills.

Mr. POTTER. Yes.

The CHAIRMAN. You think that is so?

Mr. POTTER. Mr. Chairman, I never was more thoroughly convinced of anything in my life than I am of that.

Now, that would not have the approval of the holding companies, for whom I am speaking here now, in a sense, but I believe the paragraphs (4), (5), and (6) are responsible for all of the railway ills. I think they have appealed to the vanities of the railroad men. There have been 10 years' delay of trying to work our consolidation plans and after you put through all of the consolidation plans that can be devised, you will still have 90 per cent of the present railway ills. You can not consolidate competing lines, and competing lines are where the ills are.

The way to correct the railway ills is to proceed under paragraph (1) of section 5, by division of traffic, lessening of competition among competing lines, and the railroad executives have wasted 10 years, and spent millions of dollars trying to work out consolidation plans, and if they did, they would not strike more than 10 per cent of the ills and they have done nothing in 10 years. It should be worked out under paragraph (1).

The CHAIRMAN. Do you think the consolidation provision of the transportation act of 1920 ought to be repealed?

Mr. POTTER. I do.

The CHAIRMAN. In toto?

Mr. POTTER. Yes; personally, I should absolutely repeal it, and I should put teeth in the paragraph (1), and give the Interstate Commerce Commission the power to compel competing lines to cooperate.

I know that if you will cut out this mass of competition that you can reduce the costs of hauling the commerce of this country 10 per cent, and when you reduce the costs of hauling the commerce of the country 10 per cent, you thereby increase the net railway operating income 50 per cent.

The CHAIRMAN. Who has authority to do that?

Mr. POTTER. The executives.

The CHAIRMAN. The Interstate Commerce Commission?

Mr. POTTER. And I have implored the commission to do it. I have asked the commission to recommend the strengthening of their power to compel it. This present law says that the railroads can divide traffic and earnings with the approval of the commission.

I would like to see the law amended so as to give the commission the power to compel them to do it, and when you do that, and repeal your consolidation provision that has delayed conditions for more than 10 years, you will clean up the railroad situation.

The difficulty with the railroads to-day is, more than anything else, that they are wasteful. There is no reason why rates should not be reduced, in my judgment, or why wages should not be increased; why the railroads should not be prosperous, if they cut out the present wasteful and ambitious competition, one wanting to get the better of the other. That is the case. Consolidation is to blame for all of the troubles, and for the delays, of the last 10 years.

The CHAIRMAN. Does the consolidation provision have anything to do with the Congress giving to the commission more authority, or does it, or would it be possible to legislate judgment into the executives of the railroads?

Mr. POTTER. It is a very difficult task.

The CHAIRMAN. That is what we are up against. I quite agree with you, Mr. Potter, that there is as wasteful competition in the railroad field as practically any one, but how are we going to pass a law to correct it?

Mr. POTTER. You can pass a law in five minutes putting teeth in paragraph (1) that will correct the present railway ills, and all of them.

The CHAIRMAN. I would like to suggest that you offer an amendment in connection with your testimony, if you will, that you think will do that.

Mr. POTTER. I will be very glad to.

Mr. HOCH. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. I interpret your last statement that your complaint is that the transportation act does not go far enough in permitting consolidations, rather than that it goes too far. If I understand the logic of your contention, it would be that we should also repeal the inhibitions in the antitrust laws against consolidations, in so far as they affect railway lines.

Mr. POTTER. No; no. I think that this gives an utterly false notion as to the importance of consolidations.

Mr. HOCH. If you think that the executives should have a free hand in consolidations, why should we not repeal it? Is that your view?

Mr. POTTER. I should repeal the consolidation provision.

The CHAIRMAN. He is asking you about the antitrust laws.

Mr. HOCH. If in your opinion the executives should have permission to go ahead and consolidate competing lines under existing laws, why should we not, if your view is correct, repeal the antitrust laws and let them go ahead? Of course, I do not agree with that view.

Mr. POTTER. I think that you have killed very efficiently the antitrust laws with paragraph (1). Paragraph (1) says the railroads can get together and agree upon traffic, and do anything they please, if the commission approves, and when the commission approves they have complete relief from the Sherman law. That is the whole trouble and everybody loses sight of the fact that paragraph (1), and not paragraphs (4), (5), and (6), is the one under which to correct the railway ills.

The CHAIRMAN. We are very much obliged to you, Mr. Potter.

We will meet to-morrow morning at 10 o'clock.

(Thereupon, at 11.58 o'clock a. m., the committee adjourned to meet the following morning, Wednesday, March 16, 1932, at 10 o'clock a. m.)

REGULATION OF RAILROAD HOLDING COMPANIES

WEDNESDAY, MARCH 16, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF C. B. HEISERMAN, VICE PRESIDENT AND GENERAL COUNSEL OF THE PENNSYLVANIA RAILROAD CO.

The CHAIRMAN. Judge Heiserman, we are ready for you to proceed.

Mr. HEISERMAN. Mr. Chairman, there is one phase of this case that I would like to call the attention of your Honor and your colleagues, to, and that is the testimony that was given here on February 24, by Mr. Lawrence Wilder, and Mr. Samuel Silverman.

Mr. Wilder is from Boston, and Mr. Silverman is also from Boston.

As you are aware, Mr. Chairman, neither Mr. Fitzpatrick nor I, who are the representatives of the so-called holding companies, were able to attend any of the hearings hereto, because we were tied up with the so-called consolidation case before the commission.

The CHAIRMAN. I think that this committee understands that.

Mr. HEISERMAN. But, if it had been my privilege to attend those hearings, I would have asked the privilege of examining, or cross examining, the Witness Wilder, and Mr. Silverman.

The CHAIRMAN. May I say, Judge, that is a thing that we never permit; we do not allow anybody to cross examine witnesses except members of the committee.

Mr. HEISERMAN. That is all right. I take it that you will grant us the privilege of calling witnesses on that subject.

The CHAIRMAN. I said to the committee yesterday morning, that we had set four days to hear you people, and we will be glad to have you appear just as you like.

Mr. BULWINKLE. Mr. Chairman, I suggest that the witness tell us who he is and whom he represents.

The CHAIRMAN. Judge, some of the members do not know who you are and whom you represent.

Mr. HEISERMAN. C. B. Heiserman, vice president and general counsel of the Pennsylvania Railroad Co. I am representing particularly, in this case, the Pennsylvania Co., which is a subsidiary of the Pennsylvania Railroad Co., and I also represent, as a lawyer, the Pennroad Corporation.

I was asking the privilege, at this time, not of appearing as a witness, but to ask that Mr. Pelley, who is the president of the New

York, New Haven & Hartford, may make a statement with reference to the testimony of the witness Wilder.

The program for to-day, with your chairman's approval, is that just a few minutes will be occupied by Mr. Pelley, and then I should like to call Mr. George D. Ogden, who is the vice president for New England of the Pennsylvania Railroad Co., and thereafter, Mr. Fitzpatrick will appear as representing certain interests, which as of record here, are parties to this inquiry. I presume enough time will not be left this morning for me to go on, but to-morrow morning I should like to have the privilege of appearing as a witness, if I may.

Now, will you accord me the privilege of asking Mr. Pelley the questions?

The CHAIRMAN. We have never done that in this committee, Judge. We will allow Mr. Pelley to make any statement he sees fit, and he may subject himself to interrogation by the committee.

This committee has never, since I have been a member of it, and I think for a very good reason, allowed the witnesses to be cross-examined by anyone while on the stand, except a member of the committee.

Mr. HEISERMAN. I see.

Now, Mr. Chairman, let me ask you this: This witness Wilder made some very serious statements about an issue, which I think is is not germane to this inquiry, but it certainly is not fair to leave them unanswered.

The CHAIRMAN. I presume that Mr. Pelley has read his statement.

Mr. HEISERMAN. Mr. Pelley can make his own statement, but, as to Mr. Ogden, I assumed that I might have the privilege of asking him questions.

The CHAIRMAN. We can not start that, Judge. If we do with you, we will have to do it with all of the witnesses, and it is just a policy that the committee has never varied from in 20 years to my certain knowledge.

Mr. HEISERMAN. Quite right. Well then, I suppose that I may have the privilege of asking Mr. Ogden to take the stand and testify as to Mr. Wilder's statement, and make whatever statements he cares to make.

The CHAIRMAN. Whatever statement he desires to make in reply to Mr. Wilder's statement.

STATEMENT OF J. J. PELLEY PRESIDENT, NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., NEW HAVEN, CONN.

Mr. PELLEY. My name is J. J. Pelley, president New York, New Haven & Hartford Railroad Co., New Haven, Conn.

I have only a short statement to make, Mr. Chairman.

My attention has been called to certain statements made by Mr. Lawrence Wilder of Boston, when he appeared before this committee on February 24. Certain things were said which may have left a wrong impression and I would like to clear these up.

First, the statement was made, to quote from the record, that "the Boston & Maine is not permitted to solicit business in certain territory competitive with the New Haven, but the New Haven is permitted to solicit business in any of the Boston & Maine's territory."

This is not true. The Boston & Maine and the New Haven are each free to solicit business anywhere and everywhere under the sole direction of their respective managements and without hindrance from any source.

Second, Mr. Wilder said:

> The second complaint is because of the foreign ownership of the New England roads through the holding companies. It has gagged, had the effect of gagging, silencing the New England railroad executives, and they have not been in a position to ask or demand or pray for New England what we think is absolutely essential to her industrial development.

I want to state as emphatically as I can that there is not one particle of truth in this statement, in so far as we on the New Haven are concerned, and I believe it to be true with respect to the Boston & Maine.

There has been no attempt on the part of the Pennsylvania Railroad or Pennroad officials to dictate in any way, or even suggest, the manner in which we should operate our railroad, or as to the attitude we should take with respect to consolidations. Neither has there been any attempt on the part of the New Haven officers to dictate to the Boston & Maine the attitude which they should take with respect to consolidations or the operation of their road.

The New Haven and Boston & Maine railroads are being operated independently by their respective officers for the benefit of the public, the security holders generally, and the employees.

That is all. That is all I have to say. I will be glad to answer any questions that any member of the committee may desire to ask.

Mr. MAPES. What percentage of the stock does the Pennroad hold in your company?

Mr. PELLEY. The Pennroad owns 7.27 per cent of our stock. The Pennsylvania Railroad owns 15.52, the two combined being 22.79 per cent.

Mr. MAPES. Does that constitute all of the holdings of the Pennsylvania interests?

Mr. PELLEY. So far as I know. So far as our records indicate. And, of course, I believe that it does.

The CHAIRMAN. Does any other railroad own stock in your railroads?

Mr. PELLEY. I think not, Mr. Rayburn. The New York Central had a few thousand shares and sold it about a year and a half ago. I think there are no other railroads that own any of our stock at all.

The CHAIRMAN. No other railroad owns an interest in your railroads?

Mr. PELLEY. No, sir.

The CHAIRMAN. Do you care to discuss this bill, Mr. Pelley?

Mr. PELLEY. No, sir; I have not even read it.

The CHAIRMAN. Have you read the bill?

Mr. PELLEY. I have not.

The CHAIRMAN. You know, in a general way, what it contains with reference to holding companies?

Mr. PELLEY. I do not. I do not know that, Mr. Chairman. I have not read the bill. I am not appearing on the bill, either way, for or against it. I am not qualified. I am not informed on it. I have no concern with holding companies, and I just have not followed the bill at all. I simply come here to correct some statements.

The CHAIRMAN. You have concern with reference to the ownership of the railroad, of course?

Mr. PELLEY. Well, of course, as we see it, the Pennsylvania Railroad is just a stockholder of our railroad, like many others. We have some 30,000 stockholders, and they are one of them.

The CHAIRMAN. How much stock in your railroad does the next largest stockholder control, next to the Pennsylvania and the Pennroad?

Mr. PELLEY. I do not know. I can give you that exactly. I will be glad to send it to you, but I should say probably 20,000 shares.

The CHAIRMAN. How much does that amount to?

Mr. PELLEY. That would amount to less than 1 per cent—no, less than—about 1 per cent. That would be approximately 1 per cent of the voting power.

The CHAIRMAN. So that the concentration of ownership is about 1 per cent in any other interest, besides the Pennroad and the Pennsylvania.

Mr. PELLEY. That is approximately correct. I would not want to give that as the exact figure, but it is something like that.

The CHAIRMAN. You are an officer of the railroad company?

Mr. PELLEY. I am president of the railroad.

The CHAIRMAN. You are president?

Mr. PELLEY. Yes, sir.

The CHAIRMAN. How much stock, concentrated in one interest would you think it would take to constitute practical control?

Mr. PELLEY. Well, there is much argument about that, Mr. Chairman. I do not know. It depends a great deal on conditions.

The CHAIRMAN. Twenty-two per cent concentrated is very influential, is it not?

Mr. PELLEY. Yes sir.

The CHAIRMAN. And, is it not usual that when you have your voting that the man who holds the small amount of stock, who sends his proxy, will usually send it to the larger interests, than to a smaller interest, to be voted?

Mr. PELLEY. Well, probably so.

The CHAIRMAN. That is usual, is it not?

Mr. PELLEY. Yes; I should think it would be.

The CHAIRMAN. I mean not only on railroads, but other corporations.

Mr. PELLEY. I think so.

The CHAIRMAN. So that it might be that 22 per cent concentrated ownership might constitute control, practical control?

Mr. PELLEY. Well, I daresay that you might find some companies where it does. I do not know. I imagine you would. But, the other stock is much scattered, and it may be true. I do not know. There are some arguments about what constitutes control.

The CHAIRMAN. Oh, yes.

Mr. PELLEY. What percentage.

The CHAIRMAN. You have not read this bill.

Mr. PELLEY. No, sir.

The CHAIRMAN. You do not appear against it?

Mr. PELLEY. I do not appear for or against it; I am merely appearing to correct some statements that were made here that seemed to me might influence the committee, and they were incorrect, and I wanted to correct them; I wanted you to have correct information.

The CHAIRMAN. We had a witness here that said that he favored the repeal of the entire consolidation provisions of the transportation act of 1920. Do you have any views on that?

Mr. PELLEY. No, sir; I have none that I want to express.

The CHAIRMAN. If the Interstate Commerce Commission is going to be given the authority to supervise or approve or disapprove proposed consolidations, do you think that that authority should be complete over the question, of all kinds of acquisitions, or as some people interpret it at this time, just partly?

Mr. PELLEY. Well, I do not have any set opinion on that. I have not given that much thought. I would be very glad if I could. Probably the impression was given to this committee, at least I felt it must have been, from what was said here by Mr. Wilder, that the Pennsylvania Railroad and the Pennroad Corporation are telling us on the New Haven and the Boston & Maine what we should do about any and everything, routing of business, and everything else, and I just wanted to tell the committee that that is not so; emphatically not so, and I would be glad to answer any questions that anyone wants to ask.

The CHAIRMAN. That goes as to operations?

Mr. PELLEY. That goes as to everything about our railroad.

The CHAIRMAN. As to operations?

Mr. PELLEY. Sir?

The CHAIRMAN. As to operations?

Mr. PELLEY. Well, management.

The CHAIRMAN. Well, I am talking about when you get to the voting point, when somebody has concentrated ownership of 22 per cent, probably has a better opportunity to get proxies than anybody else. I thought that might run to that, and probably would run to the actual management of the properties and operations.

Mr. PELLEY. Well, I thought that perhaps you or some member of the committee might want to ask something about this domination, or this control, the Pennsylvania corporation attempting to control us in any way. They have one representative on the board, and I think that stock ownership would give them perhaps four, and they do not seem to want any more. I am talking of trying to dominate the New Haven, why, if they were doing that, they would probably want at least the representation on the board that they were entitled to on the basis of their stock ownership, but they do not, for some reason. They seem satisfied.

Mr. HUDDLESTON. Just what do you mean when you say they have one representative?

Mr. PELLEY. They have a man who is a director of the Pennsylvania, who is also a director of our road.

Mr. HUDDLESTON. They have that duplication of directors.

Mr. PELLEY. They have one man.

And, I might say that he was put on at the request of our board. They did not even ask for that. They had a representative a few years ago; they had a board member by the name of Cuyler, Mr. T. De Witt Cuyler. At that time they owned about 73,000 shares of our stock. Mr. Cuyler died, and for some period of time they had no one on our board representing this stock ownership.

And, our board requested that they appoint a man, and they did. They appointed Mr. Jay Cooke, to serve, and he is now serving.

Mr. WYANT. Did the Interstate Commerce Commission approve his selection?

Mr. PELLEY. Yes, sir.

Mr. WYANT. Was the gentleman now serving approved as a director of the New Haven?

Mr. PELLEY. Yes, sir.

Mr. WYANT. Approved by the commission?

Mr. PELLEY. Yes, sir.

The CHAIRMAN. If there are no other questions, we are very much obliged to you.

Mr. BECK. Mr. Chairman, I would like to ask a question.

The CHAIRMAN. Mr. Beck.

Mr. BECK. I would like to ask relative to the percentage of holding of your stock. It would only become important in the event of contests, either on contests as to officers or policy.

Mr. PELLEY. I should think so, Mr. Beck; yes, sir.

Mr. BECK. Therefore, if there was a contest on candidates for executive offices, or policies, the 22 per cent would not be as effective as 78 per cent?

Mr. PELLEY. No.

Mr. BECK. That 78 per cent, I suppose, is very largely held by New England investors, is it not?

Mr. PELLEY. Yes, sir; it is held in the four States, a very large percentage of our stock, I would say, off-hand, 80 per cent of the remainder, 80 per cent of the 78 per cent is held in the four States that we serve, including New York; New York, Connecticut, Massachusetts, and Rhode Island.

Mr. BECK. If therefore the Pennsylvania Railroad or the Pennroad attempted to exert any domination over the New Haven to the prejudice of the interests of New England, 22 per cent would not be very effective, as against a 78 per cent that could be organized against them?

Mr. PELLEY. No; and my opinion is that they do not control the situation. I am quite positive of that.

Mr. BECK. Therefore, the Pennsylvania company, and the Pennroad with their 22 per cent holdings, is a very important factor when there is no opposition?

Mr. PELLEY. Yes.

Mr. BECK. That is all.

Mr. SHALLENBERGER. Mr. Chairman.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. I do not have the figures before me, Mr. Pelley, but Mr. Wilder made a statement, if I recall, that certain of the States of New England opposed the interests of the Pennsylvania in the Boston & Maine and other roads.

Mr. PELLEY. Yes, sir.

Mr. SHALLENBERGER. I think he said Rhode Island did not oppose it, and for the reason that there was a favored rate, that is, for Providence or Rhode Island, a better rate than certain Massachusetts cities, and I asked him how that could be, and he made the statement that there was a favored rate given certain parts of New England that was not given to other parts. Is that so?

Mr. PELLEY. I think it is not so.

Mr. SHALLENBERGER. That would be under the control of the Interstate Commerce Commission, anyway?

Mr. PELLEY. Absolutely.

Mr. SHALLENBERGER. The railroad company could not do it of its own volition?

Mr. PELLEY. No.

Mr. SHALLENBERGER. That is the point that I wanted to bring out.

Mr. PELLEY. I read all of Mr. Wilder's statement, and you may know that the New England States, five of them, are opposing this 4-party plan.

Mr. SHALLENBERGER. Well, I gathered that from his testimony.

Mr. PELLEY. Rhode Island is not. Rhode Island is not a party to it. The six States are not in agreement as to what should be done with reference to consolidation in New England, or consolidations without New England, outside of New England, west of the Hudson River, and I notice that Mr. Wilder had something to say about that, about the people in Providence and the people in Rhode Island. They do not agree with the majority report of the governor's committee that was appointed over there to study the situation. They have one idea, and the other five States, apparently, have another thought about it.

Mr. SHALLENBERGER. Well, that is the point that I wanted to ask you about.

I understood him to say that competition was very limited in parts of New England, that competition was practically destroyed by conditions which the railroads have framed, and I wanted to know what your statement was as to that.

Mr. PELLEY. Well, that is not correct.

Mr. SHALLENBERGER. I was interested in that point.

Mr. PELLEY. That, I take a decided exception to. That is what I say in my first answer here.

He says, for instance, that the Boston & Maine are not permitted to solicit business of any kind in our territory, and, of course, whether you understood it just as he gave it to you or not, I do not know, but the impression I got was, of what he was trying to give to you, was that because of control of the Pennsylvania in us, and we, in turn, owning the Boston & Maine, you see, we own part of the Boston & Maine Railroad ourselves, about 26 per cent, we were restricting them in the proper operation of their property; we were telling them that they could not solicit business in our territory, and that is not true; positively not true.

Mr. HUDDLESTON. His statement implied a criminal conspiracy between the managements.

Mr. PELLEY. He did not only imply it, but I thought that he said it.

Mr. HUDDLESTON. He implied a criminal violation of the anti-trust laws.

Mr. PELLEY. I thought so; yes, sir.

Mr. HUDDLESTON. May I ask you whether your company is opposed to the 4-party plan?

Mr. PELLEY. We are not. We are not taking any position at all, Mr. Huddleston.

Mr. HUDDLESTON. Do you object to expressing an opinion on it?

Mr. PELLEY. I do not know. About all I know about the 4-party plan is what I have read in the newspapers, and knowing a little

about the roads, I may know a little more about it than the average reader, but that is all I can say.

But, I have no objection to the 4-party plan.

Mr. HUDDLESTON. Mr. Wilder discussed at some length the bridge lines, and the bad situation it would leave the New Haven in, with the consolidation. Have you considered that aspect?

Mr. PELLEY. Well, I have not the slightest idea that the Interstate Commerce Commission will permit any sort of consolidation that will restrict us in any way in operations through those gateways.

Mr. HUDDLESTON. Of course, there is no question whatever but that it might have a very serious effect, to cut you off from the coal fields, and other sources of business.

Mr. PELLEY. They would not permit us to be cut off. I am not worried about that at all. The commission understands that situation and they certainly would not permit that.

Mr. HUDDLESTON. Are you willing to leave the decision to the commission without your criticism?

Mr. PELLEY. Sir?

Mr. HUDDLESTON. Are you willing to leave it to the commission to work out without your criticism or assistance?

Mr. PELLEY. I just know that those gateways are not going to be closed. I think I know that.

He talked a great deal about the New York, Ontario & Western, which you probably know from his statement that we control. We own a little over 50 per cent; have for a number of years. That is in the 4-party plan. That is assigned to the New York Central. We have not objected to the plan. I do not know whether they are going to have it or not. They are going to have to talk to us about it some day. We own it, and it may be that they will have it, and it may be that they will not have it. They have not approached us on that at all. This is just a geographic plan that has been proposed by these four groups to be worked for and to see whether it can be done.

Now, I have not objected to the assigning of the New York, Ontario & Western to the New York Central. We own it, and we have not assented to that. I have not objected. Some day they may come around and talk to us about buying it, and they may buy it, and then they may not be able to buy it.

The CHAIRMAN. That will be a matter for your directors to pass upon?

Mr. PELLEY. That is a matter for our board to pass upon, and we have not even considered it, because nobody has approached us on it. We may want to sell it, and we may not want to. I do not know. I do not know what the board will say about it. I do not know at this moment what I would say about it.

But I certainly would not object to talking to them about it, and that is about all there is to it, so far as I can see.

So I do not have anything to complain about that. What have I got to complain about? Nobody has approached me. They have just allocated this railroad to the New York Central.

I know that no one need worry a great deal about these bridge lines, because I do not believe the Interstate Commerce Commission is going to permit them to be changed, so that it will be to the disadvantage of New England, and of the New Haven. I do not have any worry about that at all. They have been open for years, and

they are going to stay open. I see that Mr. Wilder says that we are not permitted to say what ought to be done about consolidations and that we are gagged. He is not informed, because I told the governors' committee, myself, what we think about consolidations in New England, and what we found from our studies ought to be done over there, and it is all a matter of record. I do not know why he is coming down here and giving this impression. I am not gagged by anyone. Nobody has attempted to gag me about anything. I say what I think, and the governors' committee asked me, asked our railroad, when they were making this study, what we thought, and they asked a number of questions. They asked some very intelligent questions, and we answered them, and our answers told them what we thought ought to be done and it is all a matter of record. It is in the governors' committee report, and if Mr. Wilder does not know about it, I do not know why he has not read the report.

Mr. IGOE. Is Mr. Wilder an engineer?

Mr. PELLEY. I am sorry, but I can not tell you about that. I know Mr. Wilder. I have met him two or three times, and I do not know much about him.

Mr. IGOE. Has he had any railroad experience?

Mr. PELLEY. So far as I know he has not; but he has had considerable shipping experience. I think he was once president of the Brown-Boveré Co. I think he was president of the New York Shipbuilding Co. And, he knows something about water transportation. If he has ever had any experience in rail transportation, I do not know it.

The CHAIRMAN. Are there any further questions? If not, we are very much obliged to you, Mr. Pelley.

Mr. MAPES. Mr. Chairman, I would like to ask the witness some questions.

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. How long has the Pennsylvania road or the Pennsylvania interests owned some of your stock?

Mr. PELLEY. Well, Mr. Mapes, it goes back so far that I do not know; a great many years, they have owned some of our stock.

Mr. MAPES. A great many years?

Mr. PELLEY. A great many years, they have had an interest in our railroad stock.

Mr. MAPES. Have they increased their holdings materially within the last few years?

Mr. PELLEY. Oh, yes, sir; yes, I can tell you this, when I came to the New Haven Railroad, in 1929, March 1, they owned about 73,000 shares, and now they own what I just gave you.

Mr. MAPES. What, in your judgment, is their purpose in buying stock in your road?

Mr. PELLEY. Well, all I can tell you about that is what General Atterbury said, told over in Boston, why he bought it, and that they had had an investment in the New Haven, for a long time, and it had proved to be profitable, an attractive investment; that that was the dominating factor in the purchase of our stock.

Mr. MAPES. You say that is the only reason you know of?

Mr. PELLEY. That is what he said; I am just telling you what he said over there; as to why they bought it, I do not know.

Mr. MAPES. Have you any idea that they had any other purpose in mind?

Mr. PELLEY. Not that I know of. Of course, if the committee is really interested in it, I think that you might be interested in this, and if you are interested at all, the Pennsylvania Railroad is a natural ally of the New Haven. It is just a natural situation for us to be very close to the Pennsylvania Railroad in our traffic relations particularly.

Mr. MAPES. May I ask you why you own some stock in the Boston & Maine?

Mr. PELLEY. Well, that was bought some twenty-odd years ago, and I have not looked it up. I do not know much about it. The only thing I know is that it was bought during Mr. Mellen's régime, and probably he thought, as I do now, that it would be a fine thing for the two railroads to be consolidated.

Mr. MAPES. To be what?

Mr. PELLEY. Be consolidated, were operated as one; I think Mr. Mellen was president of both railroads at one time, and some objection was made to it, and it was finally settled by the State of Massachusetts creating what was known as the Boston Railroad Holding Co., where that stock is now held.

Mr. MAPES. Your ownership of that, then, is partly because of your thought that the two roads should have the same policies and be under the same management?

Mr. PELLEY. I do not know what prompted the New Haven to buy the Boston & Maine stock. This was 20 years ago, or longer than that. It must have been that they thought that the two roads should be operated as one, and certainly thought that there was an advantage in buying the Boston & Maine, and they did buy that, and they have held it since, and there has been some objection to it raised over there in times past, in Massachusetts particularly; and this holding company was created to hold that stock, and it is there held. It can not be sold except with the permission of Massachusetts.

Mr. HUDDLESTON. May I ask what were your railroad connections prior to your going with the New Haven?

Mr. PELLEY. I was with the Illinois Central all my life, Mr. Huddleston.

Mr. BECK. Mr. Chairman, may I ask a question?

The CHAIRMAN. Mr. Beck.

Mr. BECK. You were about to develop what interested me very much, and that was why the friendly relations between the New Haven and the Pennsylvania constituted them as natural allies, and then Congressman Mapes rather deflected the inquiry. Would you mind taking up the thread, what you were about to say, as to the reasons why there was a natural affiliation, or alliance I think was your phrase?

Mr. PELLEY. Yes, they are natural allies of ours. They are, in a way, our preferred connections. It is a sort of natural situation. There is a flow of traffic from this territory that they serve into our territory, and naturally it goes through the shortest route, through the Harlem River route, and the two railroads have worked together for years with their traffic, and, I think, if they did not own a share of our stock, that that relation would still exist.

Mr. BECK. What is that?

Mr. PELLEY. I think, if they did not own a share of our stock, that relation would still be there. The two railroads together built the New York Connecting Railroad, as you know.

Mr. BECK. That is the Hellgate?

Mr. PELLEY. The Hellgate route. That makes it possible for you to get on a train at Boston at 8 o'clock at night and be here at 7.45 the next morning, and not to cross any water; just go over the bridge and through the tunnel. There is a traffic lane there, that is just as natural as it can be, regardless of any ownership, and I repeat if they did not own any of our stock, we would still work very closely with them through this Hellgate route. It is just a natural condition.

Mr. BECK. In other words, that condition would exist on the flow of traffic?

Mr. PELLEY. Yes.

Mr. BECK. There would be in no sense competitive conditions?

Mr. PELLEY. Oh, no.

The CHAIRMAN. We are very much obliged to you, Mr. Pelley.

Mr. PELLEY. I am very much obliged to the committee.

STATEMENT OF GEORGE D. OGDEN, VICE PRESIDENT FOR NEW ENGLAND, PENNSYLVANIA RAILROAD, BOSTON, MASS.

The CHAIRMAN. We will hear Mr. Ogden as the next witness.

Please give your full name to the reporter.

Mr. OGDEN. George D. Ogden, vice president, New England, of the Pennsylvania Railroad.

The CHAIRMAN. Where is your office?

Mr. OGDEN. In Boston.

Mr. Wilder, on December 29, made a statement on page 178—shall I read it?

The CHAIRMAN. You may proceed in your own way, Mr. Ogden.

Mr. OGDEN (reading):

> On December 29, 1932, Mr. Fay and I called on Mr. Ogden at his office at 80 Federal Street, and he asked Mr. Ogden point blank what is the meaning, how can there be a merger in the East, exclusive of New England. Mr. Ogden said: "For once, we will give you a candid answer. When the heads of the four proposed systems sat down to make this rate devide, it was made perfectly clear to them be General Atterbury that the Pennsylvania was dominant in New England, that he had control, or working control, of the New Haven; New York, New Haven & Hartford, through its ownership of stock, of which you are aware, and through the physical connections of the New York Connecting Railroad, a very important link; that while the Pennsylvania did not own one share of the Boston & Maine, the New York, New Haven & Hartford controlled about 28 per cent through the Boston Railroad Holding Co. and the Pennroad Corporation some 16 or 17 per cent, so that while the Pennsylvania, as such, had no ownership of the Boston & Maine, it was dominant in the Boston & Maine through its control of the New Haven."

Now, that is a quotation as having been said by me.

I regret the necessity of denying it, but it is absolutely false.

Mr. Wilder and Mr. Fay did call at my office on December 29, Mr. Wilder having made the appointment the previous day and the appointment was made during my absence for 10 o'clock on the morning of the 29th, when I was expected to be at the office, and was there, and met these gentlemen.

I understood that they wanted to discuss with me how they could, representing the city administration, be helpful to the Pennsylvania Railroad in the consolidation case. That was predicated upon a copy of a letter dated December 17 written by Mr. Lawrence R. Wilder addressed to the Hon. James M. Curley, mayor of Boston, and a copy of it sent to me by Mr. Wilder's secretary with this statement:

The inclosed was dictated as Mr. Wilder was leaving for Washington to-day. He would appreciate your comments.

I shall be glad to leave a copy of this letter for the record if it is desired.

The CHAIRMAN. Was the letter written by you, or Mr. Wilder?

Mr. OGDEN. Mr. Wilder.

The CHAIRMAN. Did you reply to that letter?

Mr. OGDEN. I did not.

The CHAIRMAN. You may put it in the record, or read it either one as you desire.

Mr. OGDEN. I can save time by putting it in the record.

Also, on February 24——

Mr. HOCH. I do not understand the purport of the letter. The letter does not mean anything to me, unless I know what it is.

Mr. OGDEN. I can read it. I was putting it in to save time.

Mr. HOCH. Just tell us what it is about.

Mr. OGDEN. He makes four recommendations to the mayor, as to what they should do. Shall I read it?

Mr. HOCH. No. Just summarize it.

Mr. BECK. How long is the letter?

Mr. OGDEN. One page.

Mr. BULWINKLE. Read it.

The CHAIRMAN. You may read it if you desire.

Mr. OGDEN (reading):

DECEMBER 17, 1931.

Hon. JAMES M. CURLEY,
City Hall, Boston, Mass.

DEAR MR. MAYOR: In reference to Mr. Frank Davis's suggestion that Mr. Gerrit Fort, of the Maritime Association, be permitted to address the mayor's committee on the railroad situation and with possible reference to the city of Boston's intervention in the 4-party trunk-line merger hearings to be held by the Interstate Commerce Commission in Washington commencing January 6; after a rather exhaustive study of the possibilities of New England ports and their future, and with particular reference to the modern development of the port of Boston, it would appear that the ports would be best served and their maritime future be best developed if:

1. The Pennsylvania were to be permitted to own, operate, and complete the electrification of the New Haven, and if this group were to retain the ownership and operation of the New York, Ontario & Western, to permit direct transportation of Lake grain from Oswego, N. Y., to Boston.

2. That the New York Central continue to lease and operate the Boston & Albany.

3. (*a*) That the Boston & Maine remain an independent New England unit, and that in consideration of New England withdrawing its opposition to the 4-party eastern trunk-line merger plan, the Boston & Maine be provided with satisfactory trackage or running rights on a direct water-level route between Mechanicsville or Rotterdam Junction and Buffalo, thereby giving it direct access to the great middle western industrial centers via the Nickel Plate and Grand Trunk.

(*b*) That the above be accomplished in such a manner that the Canadian differential routes are still available to the port of Boston over Boston & Maine trackage, and that these differentials be preserved.

This would provide three competitive trunk-line routes between Boston and all points east of the Mississippi and in Canadian territory, and with the Belt Line proposals for the development of the port of Boston in effect, movement of export and import freight through Boston would offer a higher return to these trunk lines than through New York.

The attentant increase in railroad movement should reduce costs and in time should make it possible for them to lower domestic rates within the New England territory.

Respectfully submitted.

LAURENCE R. WILDER.

His secretary sent that copy to me with this memorandum:

The inclosed was dictated as Mr. Wilder was leaving for Washington to-day. He would appreciate your comment.

Also, on February 24, there appeared in the Traffic World an excerpt of Mr. Wilder's testimony to the effect that Mr. Ogden of the Pennsylvania had told him that through the use of the Pennroad Corporation, the Pennsylvania Railroad was dominant in New England, and that the Pennroad Corporation was not subject to the jurisdiction of the Interstate Commerce Commission.

I regret the necessity of emphatically denying any such statement.

He also said President Atterbury of the Pennsylvania was on record as having stated that he had no interest in the port of Boston.

I would like to just read what General Atterbury did say about the port of Boston.

The CHAIRMAN. We have a banker in our State who is president of several banks, and when he has a conversation even on the telephone he has his stenographer on an extension take down both sides of the conversation for future reference.

Mr. OGDEN. Is that a suggestion that that is what I ought to do? Well, I will accept the suggestion, implied as it is.

But the point I want to make in reading this letter of Mr. Wilder was that when these gentlemen came to see me on the 29th of December I was to believe—whether I did or not, I will not say—but I was to believe that they were very friendly to our interests.

Now, this is what General Atterbury said, and I would like for it to be a matter of record.

In answer to Mr. Wilder's statement, that General Atterbury was on record as having stated that he had no interest in the port of Boston, this is what he said:

I am aware of your keen interest in developing the port of Boston. I have nothing but admiration for these ambitions. I hope we will haul many thousands of tons and of passengers to and from this port, and we are ready to do so. However, if I were to promise you that the Pennsylvania Railroad would influence the movement of business here by any means other than the rendering of attractive service, I would be making a commitment that I would lack the power to carry out. It is fallacy that railroads can, by control of traffic, build up ports, as they must carry the freight where the shipper directs and the passenger where he wishes to go. The development of any port is the resultant of its physical advantages and the manner in which they are availed of by local enterprise. The part of the railroads should be to provide the best service of which they are capable for the handling of the traffic routed through the ports. I can, without reserve, pledge you the full and enthusiastic cooperation of the Pennsylvania Railroad in this respect.

Mr. WYANT. Was that statement made in a Boston speech?

Mr. OGDEN. Yes; made in a Boston speech on December 15.

Mr. BULWINKLE. Would you mind stating what actually ensued, Mr. Ogden, at your meeting with Mr. Wilder on the 29th?

Mr. OGDEN. Yes. Well, they asked me what they could do to further the Pennsylvania Railroad's interest in New England, and I replied in substantially these words, that I thought their cooperation as evidenced by their coming here to talk about it was all that we could reasonably ask; that the record would be made at the hearing and the case decided upon the record.

They talked for quite some time, and seemed to me to be asking questions, and also answered them themselves. There was not anything that impressed me unfavorably, except when they mentioned the Pennroad Corporation, and I recall that my reply to that was to the effect that whatever might have been done in that direction was certainly upon advice of counsel, and at the same time I called their attention that the Pennsylvania Railroad did not own a share of the Boston & Maine's stock. They also talked about the Ontario & Western.

Mr. BECK. I beg your pardon. What was that?

Mr. OGDEN. The Ontario & Western.

Mr. BECK. I did not catch the name. Pardon me.

Mr. OGDEN. And their thought was again, I say, that they would propound their questions, and they would go ahead and answer them. Their thought was that it would be a great injury to the port of Boston, and that the ownership of the Ontario & Western should remain with the New Haven, and my comment was to the effect that, of course, in these negotiations it was no doubt give and take, in many directions, and that rather than being inimical to the port of Boston, as an influence in deciding as to the Ontario & Western, where it should go, I thought that it was more likely for the purpose of equalizing transportation of anthracite and that that question was before the four-party interests. I am not sure whether they gave expression to what they thought on that, but certainly I was left under the impression that they agreed that that was likely, rather than the port situation through Boston.

The interview was very cordial, in fact, I thought well enough of it to go around and see the mayor that afternoon, it being on the 29th of December, and to take occasion to wish him a happy and prosperous New Year, and to also say to him that these gentlemen had been in to see me and we had had a cordial talk, and I understood he had sent them to see me, and he said he had.

So that my experience with these gentlemen in Boston was most cordial, and later on with the mayor, the same day. Merely for the purpose of fostering good will.

I was very much surprised to read this testimony, of course, and regret the necessity for so emphatically denying it.

I think that is all I have.

The CHAIRMAN. Does any member of the committee desire to ask Mr. Ogden any questions?

If not, we are very much obliged to you, Mr. Ogden.

Mr. BECK. Mr. Chairman, before the witness leaves, I did not catch when he begun to speak, who Mr. Ogden is.

Mr. OGDEN. Vice president of the Pennsylvania Railroad in New England.

Mr. BECK. Thank you.

Mr. MAPES. I am a little curious to know why you emphasize in New England.

Mr. OGDEN. That is the official title. I suppose, being taught to be absolutely correct, I gave you the correct title. That is the official title, vice president, New England.

Mr. MAPES. Your jurisdiction is confined very largely to the interests of the road in New England.

Mr. OGDEN. Yes; in the six New England States.

Mr. SHALLENBERGER. Are you the Pennsylvania director that president Pelley referred to on the New Haven Railroad?

Mr. OGDEN. No.

Mr. SHALLENBERGER. You are not?

Mr. OGDEN. No.

Mr. SHALLENBERGER. You represent the Pennsylvania, and not these New England railroads?

Mr. OGDEN. No; I have had some very interesting experience, but I manage to keep out of their affairs.

Mr. SHALLENBERGER. The clerk of the committee brought me the record, and I want to ask you about it again, as to the exact language of Mr. Wilder's answer. The reason I asked this question was that I had the opinion that possibly Mr. Wilder's objection to these consolidations without the consent of the Interstate Commerce Commission was because they might favor one locality as against another. In fact, one of the railroad men, who testified before this committee in reply to a question I asked him, if the railroads might be allowed greater latitude in making rates, answered that would lead, he thought, to discriminations in favor of one place as against another, or one section as against another. Mr. Wilder made the statement that in Rhode Island they did not have as favorable a rate as in other parts of New England. I asked him this question:

I understood you to say that Rhode Island did not get better freight rates, because they only had one railroad; is that true?

Mr. Wilder said, "That is true." He said, "That is based on competitive rates."

Now, the competitive rates are because one railroad has to compete with the rates of another. Then, I said, "The Interstate Commerce Commission can correct that, can they not," and he says, "Apparently not."

That is what I want to ask you, if one section of New England is being favored as against another, is there power in the law, in the Interstate Commerce Commission to correct that discrimination?

Mr. OGDEN. Yes; if it were a fault, but I understand that Rhode Island has equal rates with all other New England territory.

Mr. SHALLENBERGER. If it were true, the law could take care of that?

Mr. OGDEN. Yes.

Mr. SHALLENBERGER. Is it not true?

Mr. OGDEN. As I understand it, it is not true. In fact, we have with numerous interests made a study of the differences out of the key points in New England, and it is not too much to say, based upon an extensive railroad experience, that I know of no territory in the entire United States that is so favored with competitive rates as the six New England States.

Mr. SHALLENBERGER. Mr. Wilder's testimony, as I understood it, was that they felt if this 4-party plan went through, or any consolidation other than the Interstate Commerce Commission's, the

result would be that New England would be shut out of western freight traffic.

Mr. OGDEN. That could not really be brought about, without the consent of the Interstate Commerce Commission, even if they consolidate it.

I may say that the reason that we made this study of the routes, for instance, out of Portland, St. Louis, you would be surprised to know that there are over a thousand routes from Portland, Me., to St. Louis, competitive routes.

Now, regardless of ownership there would not be any attempt to disturb one of those routes. They are published and filed with the Interstate Commerce Commission. But, there is no occasion to disturb those routes.

Out of Boston there are perhaps over 300 different routes to Chicago that there would not be a single one of those routes disturbed, based even upon ownership.

Take the differential routes out of New England which move out through the North and which the lines known as the Hudson River gateways do not participate in at all.

Now, the trunk lines are on record as saying that because of the long existence of those routes and rates there should be no attempt made to disturb that differential rate adjustment.

The CHAIRMAN. All right, Mr. Ogden, we are very much obliged to you.

STATEMENT OF HERBERT FITZPATRICK, VICE PRESIDENT AND GENERAL COUNSEL OF THE CHESAPEAKE & OHIO, PERE MARQUETTE RAILROAD CO.; GENERAL COUNSEL OF THE VIRGINIA TRANSPORTATION CO.; VICE PRESIDENT, LAW AND CORPORATE RELATIONS, MISSOURI PACIFIC, GULF COAST LINES, AND TEXAS PACIFIC RAILROADS

The CHAIRMAN. Mr. Fitzpatrick, we will hear you.

Mr. FITZPATRICK. My name is Herbert Fitzpatrick, vice president and general counsel of the Chesapeake & Ohio——

Mr. BECK. Will you keep your voice up?

Mr. FITZPATRICK. I will do the best I can.

The CHAIRMAN. I will state that Mr. Fitzpatrick has just had a siege of something like the flu, and he is not very well.

Mr. FITZPATRICK. I think that you will not have any difficulty in hearing me, however. I am vice presdient and general counsel of the Chesapeake & Ohio, Pere Marquette Railroad Co., general counsel of the Virginia Transportation Co., vice president law and corporate relations, Missouri Pacific, Gulf Coast Lines, and Texas Pacific Railroads, and although I am not the counsel and have no official connection with the Allegheny or the Chesapeake, so far as the analysis of this bill is concerned, I am also speaking for them.

I may say at the threshhold of this matter that I have prepared a statement, which I will read, possibly not confining myself entirely to the text, and possibly I will illustrate at certain points just exactly what our thought is. It may seem to some of you gentlemen that I am going somewhat into simple matters of detail, but I am doing this because it is our desire that this committee have a full picture of this bill, and this situation as we see it.

The purpose of the bill (H. R. 9059) is as stated in its caption, to amend section 5 of the interstate commerce act. This portion of the act relates first to the acquisition of railroad properties by carriers, and second, to consolidation of such properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties, theretofore in separate ownership, management, and operation. The bill strikes out certain paragraphs, and for them substitutes certain rewritten paragraphs.

In order that there may be no confusion in the thought, it is desirable, first, to call attention to the paragraphs as they now are, which are omitted, and then rewritten.

First is paragraph (2), which provides that a carrier may make petition to the commission for the acquisition of control of any other carrier. Particular attention should be directed to the fact that this paragraph has to do with no corporate entity except a carrier and has nothing whatever to do with individuals. The transportation act of 1920 gave to the commission jurisdication to the extent therein stated over carriers, but did not go further. The Second paragraph which is stricken out makes lawful for two or more carriers, railroads subject to the act, to consolidate their properties or any part thereof. There is no mention of purchase, merger, and nowhere in the section is the word "unification" used.

When the transportation act was passed, the right was given plainly and unmistakably, to carriers, to either, subject to the approval of the commission, acquire or to consolidate properties of two carriers into one corporation for the ownership, management and operation of the properties theretofore in separate ownership. The bill which is now before this committee changes the policy of the transportation act with respect to acquisitions and consolidations and goes further than the Congress has heretofore gone with respect to the regulation of the subjects. It is not necessary to call attention to the provisions of the proposed bill which only alter the verbiage of section 2. The matters of principle, however, should be noted, and consequently the new additions as carried in the proposed bill as compared with the law as it now is, will be summarized. First, paragraph 4, on page 2, of the new bill, adds this significant language which makes it unlawful, without the consent of the commission, for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock, or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock. Through the bill, therefore, the Congress is attempting to control a corporation which is not a carrier. It makes no difference under the plan of the bill, what sort of a corporation it is, eleemosynary, a trust company, a banking concern, an investment company, or what not, It can not acquire control of more than one railroad, except by the consent of the commission. It makes no difference what the circumstances are. It becomes an unlawful thing for the corporation owning control of one railroad to acquire the control of another, irrespective of the location of the carriers. One carrier may be in Maine, and the other carrier in Texas. Competition between the two may not be possible, and yet under this bill, and under those circumstances, the acquisition of control by any corporation without the consent of the commission is an unlawful act.

Difference No. 2—Hearing: The hearing provided for as shown on page 3 must be so conducted, that the commission shall affirmatively find that the public interest will be promoted by the transaction. Under no other circumstances may such an order be issued. It is difficult to see how if lines are not supplementary, if they are not located so that they are connecting, if they are so situated that they have no relation, and all that is to be done is that corporation X which owns the control of one is to buy the control of the other, how a record can be made that will warrant an affirmative finding, which is a very different thing from finding to the effect that the public interest will not be injuriously affected.

Difference No. 3—Issuance of securities: Under the new bill a corporation which is not a carrier goes to the commission for permission to acquire the control of a second carrier, already a noncarrier company, owning one. If permission be given it at once, although not engaged in interstate commerce, although possibly not having the power to operate a railroad, although its main business may be as a trust company, is considered a common carrier subject to the provisions of the act relating to the issuance of securities, and the assumption of ilability.

Difference No. 4—as to persons: Up until this time, the act proposed has been dealing with corporations. Congress has been legislating with regard to corporate entities. Now, however, paragraph 5 of the new bill makes it unlawful

for any person (and "person" is defined to include individuals, partnership, association, or corporation) to accomplish or effectuate or to participate in accomplishing or effectuating the control or management in a common interest of any two or more carriers, however such result is obtained, except upon the consent of the commission. Stated baldly, under this act, an individual owning the stock control of one railroad can not buy the stock control of another without the consent of the commission, and "control" in this case is defined to include the power to exercise control or management. Under this provision an individual owning what may be held to be the stock control of one carrier bought for and an investment with which he has done nothing, except as a stockholder to vote for a board of directors, can not own the stock control of another carrier, although that control may have been bought for an investment; and the statute proposed not only makes unlawful the holding by the individual of control, but provides in (*a*) and (*b*) and (*c*), that the personal title to stock is further affected by reason of the fact that if affiliated with a carrier, the individual stock purchase may be construed in connection with the stockholdings of the carrier in which he may be a stockholder, or the stockholdings of individuals affiliated with a carrier, the definition of affiliation being sufficiently broad to include practically any sort of corporate connection.

Difference No. 5—Divestiture: Here attention should be particularly called to this: There are two provisions in this bill which have to do with divestiture, each under a different set of circumstances.

Upon page 6 of the proposed bill, the commission is authorized, upon complaint, or upon its own initiative without complaint, but after notice and hearing, if any person is holding the stock control of more than one carrier, without the consent of the commission, to make an order requiring such person to take such action as may be necessary in the opinion of the commission. And, note this language "to prevent further violation of such provisions," which means, no doubt, the further continuance of such holding or such a provision as may reach into the future and say to the person being divested that he shall make no future purchases, and that such future purchases will not be possible. It seems to make no difference what the object of the purchase, the holding has been made by statute unlawful, and if unlawful all that is to ge done is to tell the individual to divest himself in such way as the commission may deem wise, with such additional action as may prevent further violations.

Difference No. 6: This I call "plan divestiture," because it is based on the connection between the stockholdings and the possible interference with the plan. For the proper protection and furtherance of the plan for consolidations of railroad properties an additional power is given to the commission. It may investigate and determine whether the holding by any person of any part of the stock or other share capital of any carrier is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another of the systems provided for in such plan by reason of subjecting such carrier to the control, domination, or influence of another carrier. If the commission finds, after such investigation, that such holding has or is likely to have any of the effects so described, it shall by order require such person to divest himself of such stock. This, again, is a new provision in the law. It is true, stocks acquired before February 28, 1920, are not the subject of divestiture, although it is rather difficult, as a matter of principle, to conceive just why, if the plan of the commission is to become all important and stocks held possibly in opposition to that plan are to be made subject to divestiture, what difference the time of acquisition has. If X holds stocks against the man and has bought them since 1920 then he may be divested. If Y holds stocks against the man, which were bought in 1918, he can not be divested. Another new feature is to provide in the law what has heretofore never been in the law, that the various systems set up by the commission in its plan must be absolutely independent one of the other, and that a mere holding by an individual or company of railroad stocks, no matter how held, in more systems than one, may, under certain circumstances, become the subject of a proceeding for divestiture.

These are the main points of difference between the law as it now is and the law as it is proposed, and they are somewhat in detail recited for the reason that there seems to be the thought that section 5 of the interstate commerce act is not being substantially modified, when as a matter of fact, so radical is the transformation that it is quite safe to say that these changes not only go further than has heretofore ever been suggested, but as well fundamentally change the purpose and policy of the transportation act.

In order that there may be a clear understanding and because of the current, or what seems to be the current, misconception of what is now proposed, attention should be briefly directed to the history of this legislation. The present bill is usually termed "the holding company bill." It would better be termed "a bill providing for the control of all stockholdings in railroads whether personal or corporate." The so-called holding company is only a stockholder, and as a matter of fact most of those which are termed "holding companies" are rather investment corporations or companies.

I do not know that it will serve any good purpose to now draw the distinction made in the cases between a holding company and an investment company, except to say that many of the companies discussed in connection with this bill are not holding companies in the light of the cases. The holding company is essentially an operating company; the investment company has no such charter powers and is not so intended and under the law as it now is can not operate railroad properties The investment company does not have as its sole purpose the control of the affairs of the corporation in which it may have an interest as a stockholder.

In 1920 the Congress passed what is generally termed the "transportation act," and an important part of that act adopted as a policy of the United States Government the theory of consolidation of railroads and provided the terms under which those consolidations might be voluntarily effected. The duty was imposed upon the commission to make a plan covering continental United States. As a result of the passage of the transportation act, a large number of cases were brought under paragraph (2) of section 5, because it was realized that to solve the problem of consolidation, it was desirable through the medium of this particular paragraph, that the first steps should be taken. Upon petition to the commisson there was settled the fact that it was in the public interest that one carrier should acquire the stock control of the other, and the terms and conditions of the acquisition were approved Never has there been a greater need for the existence of paragraph (2) of section 5 than to-day.

In December, 1929, the commission made public its complete plan, which provided for five systems in eastern territory. Long prior to this date, the chief executives of the New York Central, the Chesapeake & Ohio, the Pennsylvania, and the Baltimore & Ohio Railways had been in conference attempting to work out what in their judgment was a feasible plan for the allocation of railroad properties in eastern territory, and an agreement was finally reached.

The first legal step to carry in effect the changes in the five-systems plan of the commission and the result of these changes to set up four systems in eastern territory, was to file with the commission the necessary petition to modify its complete plan under this statute. This has been done, and these hearings are now completed before the commission and the case will be, within a few weeks, submitted. The four parties, above mentioned, signatory to the petition, have indicated that when these changes are made, proceedings will be filed before the commission for the acquisition of the various carriers involved, and a good faith attempt made to set up in eastern territory the four great railroad systems to serve the public.

If the plan shall be so modified, it is quite apparent that in many instances paragraph (2) of section 5 must be utilized to acquire stock control of the various carriers involved, all upon petition to the commission, and all approved by the commission, if it meets the tests, and that this will be the step which will lead finally to complete consolidation. It is this section which is to be changed, unnecessarily, I think, and certainly as a whole not helpfully. Under the law as it now is, although in phraseology it may be limited to consolidations, still the commission has approved more than one transfer of property. In a notable case, all of the physical assets of the Hocking Valley Railroad were transferred with the approval of the commission to the Chesapeake & Ohio Railway Co., the Hocking Valley Railroad Co. dissolved and complete consolidation of the physical properties resulted, so that as to the practical situation, there is no added power for accomplishment in the proposed bill; and no necessity for broadening in this respect the present act. All of these various steps, of course, consume time. The negotiations ran over a period of almost or quite eight years. In the meantime, various investment corporations were formed. The corporate form was nothing new. In some instances their stocks were listed on the exchange, and the ownership of the public in railroad securities was much broadened. These companies invested in railroad securities, sometimes buying stock, sometimes buying bonds, because the public had faith in the ultimate working out of the general transportation system in this country. These companies thereby became stockholders in various railroads. It is quite evident that they could not become stockholders, or controlling stockholders, in "parallel and competing lines," and

thereby affect competition. Otherwise they would come within the purview of the present laws. They were not common carriers, and were not subject to the jurisdiction of the commission. They conducted their business as a great many other businesses in this country are conducted without regulation from utility commissions, or the Interstate Commerce Commission. Because of the fact that they held railroad securities—common stock, preferred stock, or bonds—the idea has grown that they should be termed, as they are now, "holding companies," and the bill, H. R. 9059, has for its ostensible purpose the regulation of these companies.

If it be said that the Alleghany Corporation holds the ultimate majority stock control through the Chesapeake Corporation of the Chesapeake & Ohio Railway Co. and owns the Nickel Plate Railroad, and in part the Erie Railroad, all this means is that it is a stockholder with power of a stockholder, and no more, and it must not be forgotten that these holdings are in conformity with the plan of the commission, all of these railroad properties being grouped together by the commission. I am now referring to the Chesapeake & Ohio Railway Co., the Erie Railroad Co., the Pere Marquette, and the Nickel Plate. If the theory of the present law is that holdings should not be allowed in opposition to the plan of the commission, then it is difficult to understand why it is presently sought to enact this statute. So far as I am advised there are no holdings by the so-called holding companies which after offer of purchase are held for opposition to the plan of the commission. It has been testified in the 4-party hearings now before the commission that after the 5-party plan of the commission was brought out, the president of the Pennsylvania Railroad said to the then president of the Wabash Railroad that if he could set up the fifth system, there would be no opposition on the part of the Pennsylvania Railroad. When the fifth system failed of accomplishment, if it has failed, it has been because of its inherent weakness, not because of any opposition which was put in its way by any holding company.

So far as the Chesapeake-Nickel Plate interests are concerned, it is on the record in the four-party hearings that there are no interests held in that particular group which are contrary to the commission's plan with the exception of the Chicago & Eastern Illinois and the Wheeling & Lake Erie, and by the way, the Wheeling stock is held in trust under approval of the Interstate Commerce Commission, and under the order of that commission. And I may say, with respect to the Chicago & Eastern Illinois, and the Wheeling, both, there is now pending a petition before the commission to change the commission's plan. There is nothing new in that. This procedure is not a new one. It has been done before, and the commission has, in previous cases, changed its plan and allocated the properties to be acquired, notably, recently in the acquisition of the Cotton Belt by the Southern Pacific—I think I am right in that—at the time of that acquisition, there was filed before the commission a petition that the commission change its plan and that the Southern Pacific be allowed to take, and it is my information that that has been done upon order of the commission.

It is true that the Alleghany Corporation owns the control of the Missouri Pacific Railroad—that is, the majority stock control—which is not grouped with the Chesapeake & Ohio or the Nickel Plate. That holding is a legal one. There is nothing at present in the law which forbids an individual, whether corporate or otherwise, owning stock in two railroads, where there is no question of competition, no question of restraint of commerce. There can not be common management, there can not be interlocking officers, there can not be interlocking directors, between these groups, or between any two railroads, unless the commission shall approve. For a number of years western railroads have had large investments in eastern railroads, and in mid-western railroads, and so far as can be seen, no harmful effect has resulted.

The present law does not provide that the various groups shall be independent. This is, for the first time, to be written in the law by this statute, and it is suggested that there can be no good reason for enacting, that the mere ownership of stock by an individuality interested in another group shall be inhibited. Certainly, the idea is entitled to most serious consideration if the right of an individual to private property is to continue.

The proponents of the bill seem to have confused common ownership in a single individual with consolidation of properties. There has been much talk about consolidations and unifications through holding companies. There can be no such thing. If a holding company holds the majority stock control of two railroads it is true that the control so far as voting as a stockholder and possibly electing a board of directors is in a single individual, just as it would be if Mr. X or Mr. Y owned two railroads but in either event a company or individual is only a stockholder. He, or it, may vote the stock owned for a board of directors, but the same people can not be on the two boards without the consent of the commission. The two companies can not have the same president, or officers, without the consent of the commission; they can not have the same general manager without the consent of the commission as the law is now. So that all of the discussion which has been indulged in with regard to consolidation, through individualities, whether corporate or otherwise, can serve no purpose, as I see it, except either to confuse or mislead. At the present, the managements must be absolutely independent, and are, unless the commission has approved the interlocking boards or interlocking officers. The investment company is only a stockholder.

It must not be overlooked that these so-called holding companies have thousands of stockholders all over the country. Going back for a moment to the question of unification by holding companies. As was before said, this word does not occur in the transportation act. Hazy as it is, as to its legal meaning, it has been brought into this situation no doubt because of its indefiniteness, because that very thing gives it a flexibility which a more strictly legal term might not have. Two railroads, no matter how they may be owned, can not be operated together; can not have mutual trackage arrangements; can not have operating agreements, unless with the consent of the commission, and it is difficult to understand if the unification which has been so much discussed were any more than a myth, why carriers which are under common stock control, directly or indirectly, if that control has consolidated them, should be constantly before the commission seeking authority from that body under the law as it now is for acquisition of stock, for lease, for operating arrangements, for interlocking directors, and for all of the benefits which Congress had in mind, would grow out of operation and ownership when it passed the consolidation sections of the transportation act.

As has been said, the bill is in reality an attack on railroad securities. If effective, it may result in any individual, trust company, holding company, which comes within its terms being called before the commission and told to dispose of the securities held. The fact that they would be turned over to a trustee will not protect the investment, and in a time of business stress it is urged that before such a shadow shall be cast over the holdings of railroad stocks, which affect the general railroad situation, the proposal presents a most serious situation, and should receive the most careful consideration. And this causes me to reach the question, "Why is it sought to change the law? What is the evil to be remedied?" It is admitted that the present statute with regard to consolidations is not complete. It is admitted that the present statute might possibly be simplified and bettered. It is well known to this committee that long hearings were held and to meet this general situation was brought out in the House the Parker bill, and in the Senate the Fess bill, each having for its purpose the setting up of proper machinery to effectuate the governmental policy with regard to consolidations.

This bill, however, does not simplify the procedure. It proposes no constructive thing. It simplifies in no respect the present law with the possible exception of the repeal of subparagraph (b) of paragraph (6) of section 5 which provides that the securities of the consolidated properties shall have a certain relation to the value of the consolidated property. All that this bill provides is that certain things, until this time lawful, shall hereafter be illegal. In other words, instead of simplifying the procedure, instead of making it easier to carry out the great national policy of consolidation, it leaves the main question untouched and says that the things which have been done legally under the law shall now become illegal and to this extent imposes greater difficulties upon the effectuation of the national policy.

This bill drives straight at the heart of personal ownership. For the first time in legislation of this sort the individual is to be told what he must do. The trust company, the bank, the investment company is to be told what it must do with respect to the stocks of railroad companies which are not parallel, which are not competing, and under circumstances such that, so far as can apparently be seen, the ownership of the two carriers in no means and in no way affects the fundamental question of interstate commerce or the regulation thereof by the Congress.

I will not discuss the retroactive features of this bill; the lack of due process of law in the divestiture proceedings; whether or not the suggested divestiture is in reality a taking or an aspect of taking for public use; and, if so, whether the divestiture plan proposed gives adequate compensation. These questions have been, if not covered in the various statements before the committee, at least

mentioned, and the cases which have been laid before the committee furnish the source from which may be drawn the principles which determine whether or not these various provisions of the bill proposed can be sustained. I do wish, however, to call attention to the basic principles of congressional legislation.

The CHAIRMAN. Right there, Mr. Fitzpatrick, you are entering upon a new subject, and you can not complete to-day. I am sure that the committee would like to ask you some questions, so we would like to have you go on to-morrow.

Mr. FITZPATRICK. All right, Mr. Chairman. I will be here to-morrow.

(Thereupon, at 11.45 o'clock a. m., the committee adjourned to meet the following morning, Thursday, March 7, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

THURSDAY, MARCH 17, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn (chairman) presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF HERBERT FITZPATRICK, VICE PRESIDENT AND GENERAL COUNSEL OF THE CHESAPEAKE & OHIO AND PERE MARQUETTE RAILWAY COS.; GENERAL COUNSEL OF THE VIRGINIA TRANSPORTATION CO.; VICE PRESIDENT LAW AND PUBLIC RELATIONS, MISSOURI PACIFIC, GULF COAST LINES, AND TEXAS PACIFIC RAILROADS—Resumed

The CHAIRMAN. Mr. Fitzpatrick, we are ready for you to proceed.

Mr. FITZPATRICK. Mr. Chairman and gentlemen of the committee, I had just said on yesterday, before I closed, reading the paper, that I would not discuss the retroactive features of the bill, or the lack of due process of law in the divestiture proceedings, whether or not the suggested divestiture is really a taking or aspect of taking for public use, and if so, whether the divestiture plan proposed gives adequate compensation, but that I do wish to call attention to the basic principles of what I conceive to be the proper congressional regulation, and it is to this question which I now will address myself.

This is a foundation question. It is not my purpose to say or intimate that the power of the Congress to regulate interstate commerce is not plenary. It is full and complete, but it is equally plain and equally uncontradicted that when a regulation is proposed it must have substantial and direct relation to interstate commerce. It is not necessary to cite cases. The law has been to this effect since Marshall's time, and most of the later cases are applications of this fundamental doctrine. Here in this bill, however, it is proposed that an individual, corporate, or person, who is not in interstate commerce, unless the holding of the controlling shares in a carrier puts that individuality in interstate commerce, is to be regulated in his subsequent ownership of similar stocks. The regulation reaches the ownership. Therefore, it must follow that if the ownership and nothing more of the controlling shares in an interstate carrier does not constitute interstate commerce, then the regulation here proposed as to individuals and companies not in interstate commerce is void as contrary to the Constitution. It is, of course, to be noted that the question does not relate to the interstate sale of securities but to sales of securities of interstate common carriers.

We are then faced with this question: Does the fact that a common carrier is engaged in interstate commerce render the sale and/or ownership of its securities itself interstate commerce, so as to give Congress power of regulation? It is submitted that there is no authority for the statement that the mere ownership of stock can be considered interstate commerce, merely because of the nature of the property sold, or if stock be considered to represent property of that which it represents. It must be remembered that in the act as now drawn Congress is dealing with individualities which are not engaged in interstate commerce and who must affirmatively do something to bring them within the language of the Constitution. This is not to say that ownership carried on or maintained in such way as to restrain interstate commerce may not fall under the ban of antitrust statutes, but the present act passes beyond that limit and lays down the law that it shall make no difference whether control has been exercised in any way, or whether it has not been exercised, or whether it is possible that such control may restrain interstate commerce, or is not possible.

It is a striking thing that in this day and time, when throughout the country in magazines, newspapers, in forums or of one sort or the other there has been much discussion of the revision of the Clayton Act, revision of the Sherman law, in this, that, or the other particular, to the end that business will have greater freedom for the accomplishment of desirable business results, this bill is now brought forward which goes further than either the Clayton Act or the Sherman Act, which indeed goes further than any law which has yet been proposed in its restraint upon individual or personal endeavor. In both the Clayton Act and the Sherman law, the illegal thing, briefly stated, was that as the result of something done, interstate commerce was affected in some way. This bill does not proceed upon that theory. This bill proceeds upon the theory that it is an illegal thing for an individuality to control more than one of a certain kind of property. It makes no difference whether interstate commerce is affected or whether it is not affected, the vice is that X, as an individuality, has, without the approval of the commission, acquired two instead of one. It is perfectly legal to acquire one, but if that place be passed and the second be acquired, the unlawful act is committed. The right of the individual to do a thing which is not said to affect commerce, directly or indirectly, has had put upon it the stamp "unlawful."

The Sherman law was framed in sweeping and comprehensive language and included every combination, regardless of its form or structure, in restraint of trade or commerce among the several States and every person monopolizing, or attempting to monopolize, any part of such trade or commerce. The Clayton Act reached the acquisition of stock by one corporation in another corporation engaged in interstate commerce where the effect of such acquisition may be to substantially lessen competition between the corporations or to restrain such commerce or tend to create a monopoly of any line of commerce, but there interstate commerce had to be affected. Some act had to take place, and the Supreme Court said that the mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden. The act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, that is to say, to such

a degree as will injuriously affect the public. Obviously such acquisition will not produce the forbidden result if there be no preexisting competition to be affected, for the public interest is not concerned in the lessening of competition which, to begin with, is itself without real substance. (International Shoe Co. case, 280 U. S. Reports.)

Mr. BECK. Is not that the United Shoe Machinery case?

Mr. FITZPATRICK. I think that the International Shoe Co. is the way the case is cited.

Following this thought further:

> The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Manifestly, any rule prescribed for the conduct of interstate commerce in order to be within the competency of Congress under its power to regulate commerce among the States must have some real or substantial relation to or connection with the commerce regulated. (Adair *v.* United States, 208 U. S. Reports.)

And that principle runs immediately back into the history of the Sherman Act, and the Clayton Act, and a casual reading of either will show how, at that time, the conclusion was reached that the regulation must have a direct and substantial relation to commerce.

These principles reach House bill 9059, which proposes to regulate the ownership of stock in a carrier because the carrier is engaged in interstate commerce and not because the stock, or ownership of stock, has any direct or substantial relation to interstate commerce. This statute in terms deals only with ownership. It forbids the exercise of an ordinary property right and the ownership affected grows out of a personal transaction, distinct and complete in itself, separate from and without regard to the company or the affairs of the company in which the stock may be held, and consequently, the commerce in which the railroad may be engaged can in no wise be affected by the mere ownership of the stock. So long as the courts hold that there must be a direct and substantial, not incidental, not indirect, but direct and substantial relation between a valid regulation of interstate commerce and the commerce regulated, the principle of this bill can not be sustained.

I thank you, gentlemen.

Mr. BECK. Mr. Chairman.

The CHAIRMAN. Mr. Beck.

Mr. BECK. I have listened with profound interest to the witness's statement, and I do want, in the first place, speaking wholly for myself, to say if you should reprint it in clear type I would be very much indebted for a copy. I would like to study that.

Now, independent of that, is there not another constitutional angle? As to that, I would like to ask your opinion. Of course, regulation of commerce is a legislative function, and within reasonable limits it can be delegated to a legislative agency of Congress, such as the Interstate Commerce Commission. Therefore I can understand the delegation to the Interstate Commerce Commission of the determination as to whether or not the consolidations of different carriers are destructive of the competitive conditions which the transportation act requires; that the commission should have in mind, and which it determines as questions of fact, whether competitive conditions are unreasonably destroyed or whether in fair regard for all interests concerned the destruction of competitive conditions is one as to which the Sherman law can be relieved. But now, as I understand certain

portions of this bill, the power is delegated to this commission to determine broadly whether it is in the public interest that a holding company, or, as you say, an individual, should either acquire stock, or should continue to hold the stock previously acquired, which of course presents a different question.

Now, do you think, Judge——

Mr. FITZPATRICK. I am not a judge, Mr. Beck. I am just an ordinary lawyer.

Mr. BECK. Well, do you think then, Mr. Extraordinary Lawyer—you are not an ordinary lawyer—do you think that any decision, heretofore given by the Supreme Court, as to the limit of delegation of legislative power, can be broad enough to say that Congress should vest in the Interstate Commerce Commission the power to determine whether acquisition of stock, or retention of stock already acquired, was or was not in the public interest?

Mr. FITZPATRICK. You start in your question with the premise that the stock has heretofore been lawfully acquired and the question is, the next question, as to whether the power may be put in the commission.

Mr. BECK. Well, that is not a necessary premise. That has already been acquired. That simply brings up the other question of the ex post facto character of this law, as I read it, but I mean whether previously acquired or whether it is to be acquired in future, whether there could be such a broad delegation of legislative power to administer, as to permit them to determine whether it is in the public interest that a holding company can hold stock.

Mr. FITZPATRICK. I think not.

Mr. BECK. Now, passing that point as to which I wanted your opinion, as you have thought very deeply on this question in its constitutional aspects. As you say, this power to regulate is, after all, the power to regulate. That undoubtedly includes the power, in a proper case, to prohibit, but one has to read the commerce power of the Constitution in connection with the fifth amendment to the Constitution. Therefore, it reads that Congress shall have power—I mean, this is as interpreted by the court—Congress shall have power to regulate, or even to prohibit interstate and foreign commerce, provided that it can do so without taking away property without due process of law.

That is practically what it means. If, therefore, a stock has been acquired without challenge and under existing law and it has no direct relation, as you have just argued, to the monopolization or undue restraint of such commerce, and the Interstate Commerce Commission is asked to formulate a scheme of railroad consolidations, which the carriers may or may not accept, can it be that the Interstate Commerce Commission can say that it can be vested with the power to say that either the future acquisitions or the past acquisitions of stocks will not be permitted if it thinks that it is not in the public interest?

Mr. FITZPATRICK. Well, do I get your question in this way, Mr. Beck, that you are now driving at the power of the Congress to vest in the commission its powers to that effect?

Mr. BECK. Yes.

Mr. FITZPATRICK. I think that could not be done.

Mr. BECK. Let me ask this: I do not want unduly to consume the time here, because there are other members that will undoubtedly desire to ask questions, because your discussion goes profoundly to the very constitutional roots of the whole question, if Congress itself has the power. I am leaving aside now the element of delegating it to the administrative bureau, but if Congress itself has the power to determine whether property can be acquired, the ownership of stock can be acquired in railroads, if it does not regard it in the public interest, quite irrespective of monopoly, that is, as distinguished from regulation. But, if it has, would not it, constitutionally, have the power to say to the great industrial undertakings, which engage in interstate commerce, "We will determine whether it is in the public interest" that A, B, or C shall own part of the great oil industry that is engaging in interstate commerce, or Mr. Ford's factory, as he ships in interstate commerce? In other words, while the railroads are a peculiar instrument of commerce yet, nevertheless, logically does not the reasoning of this bill hold that in respect to all undertakings, whether transportation or industrial undertakings, that if Congress thinks, having in mind interstate commerce, that it is not in the public interest for people to acquire stock or, having acquired it, to continue to hold it, would not the argument for the power of Congress be broad enough to mean that no one in this country could have the partial ownership of industrial corporations, if Congress determined that it was not in the public interest?

Mr. FITZPATRICK. Of course, if the Congress is dealing with a subject which is a matter of interstate commerce, then we all agree that the power is plenary, provided the regulations have direct relation to interstate commerce. That is all that is necessary.

Mr. BECK. And not arbitrary.

Mr. FITZPATRICK. And not arbitrary.

It seems to make no difference, particularly, if you grant that the subject is one in interstate commerce, whether Congress looks forward or looks backward.

Mr. BECK. Yes; but that is not my point. My point is that an industrial undertaking that is not a railroad at all—we will say, the Standard Oil Co.—is engaged in interstate commerce. Now, is not the argument for the constitutionality sound and broad enough to say that it will determine who shall own the stock in the Standard Oil Co.?

Mr. FITZPATRICK. Quite so, if you grant the premise that the Standard Oil Co. is in interstate commerce.

Mr. BECK. Yes, of course, that is the premise.

Mr. FITZPATRICK. Quite so.

Mr. BECK. Now, of course, the Standard Oil Co. can be compelled, as it has been, to break up its stock, but that was because of the monopoly of the holding of that stock was monopolization of interstate commerce.

Mr. FITZPATRICK. Yes.

Mr. BECK. But, if no such monopolization, can the Congress itself hold that whenever it regards the ownership of stock as not in the public interest, that they could compel the man to sell the stock?

Mr. FITZPATRICK. I think your statement is correct.

Mr. BECK. That is all, Mr. Chairman.

Mr. MAPES. Mr. Chairman.

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. Mr. Fitzpatrick, you have given a very intelligent and informative analysis of the differences between this bill and the existing law, and have discussed very interestingly the constitutionality of this bill.

Do you care to say anything about the merits of the bill, or the provisions of it, relating to the divestiture of the stock of these holding companies by the Interstate Commerce Commission, for the considera tion of the committee, if it should decide that the bill and the general purposes of the bill were good and constitutional?

Mr. FITZPATRICK. Answering that question, Mr. Mapes——

Mr. MAPES. Let me ask you first, and you discussed it yesterday, the language of paragraph (5) on page 4, do you think that, as it stands, would apply to the past acquisitions of stock, or only to future acquisitions?

Mr. FITZPATRICK. I am inclined to think that particular paragraph would apply to future acquisitions.

Mr. MAPES. Only?

Mr. FITZPATRICK. I am inclined to think that; but there is a provision which is to this effect:

> It shall be unlawful to continue to maintain control or management accomplished or effectuated in violation of this paragraph.

Now, I would think that, as far as the construction of that is concerned, that would mean acquisitions in the future; but I can conceive that it might be construed to mean an acquisition in the past under such circumstances that those circumstances were not in keeping with the provisions of this bill, and if it is the purpose of this committee that that paragraph shall apply only in the future, and as to acquisitions made in the future, then it would seem to me desirable that it should be clarified.

Mr. MAPES. I would like to have some one discuss the equity of the provision which authorizes the commission to cause a divestiture of the ownership of stock acquired before February 28, 1920, as compared with the same power on the acquisitions of stock acquired after the passage of this act, and if the commission is to be given such power, what the merits of this particular part of the bill are.

Mr. FITZPATRICK. You are now addressing yourself particularly to that portion of the bill which I have heretofore called plan divestiture?

Mr. MAPES. I did not catch what you said.

Mr. FITZPATRICK. Plan divestiture, which is on page 7 of the bill; that is, where stocks are held, or supposed to be held, in opposition to the completion of the plan of the commission, that then the commission shall have the power to, upon proper showing, order the divestiture of those stocks.

Now, it seems to me that you gentlemen are bordering on a very radical change in the policy of the law as it is at present. At present we are dealing with the consolidations, and so far as I am personally concerned, I am thoroughly in accord with the great national policy as declared by the Congress of consolidations. I think it is highly desirable.

Now, we, however, are dealing with voluntary consolidations, and when you say that stock bought by A, B, or C, whether corporate or

individual, and which may be held seemingly in opposition or in reality in opposition to the plan of the commission, and that you then give to the commission the power to say to A, B, or C "you must turn those stocks loose"—it does not say to whom they shall go—but, "you must turn them loose in the interest of the completion of the plan," you are coming very close to something that is compulsory consolidation, and I said yesterday, I think, that is a question for grave consideration for this committee.

Mr. MAPES. I would not have much trouble in reaching a conclusion if Congress sees fit to say to the holding companies that it will be unlawful from this time forward to acquire stock in railroad companies contrary to the provisions of this law, it would not be hard for me to say that if anybody went ahead and acquired stock contrary to the law, that the Interstate Commerce Commission should have authority to compel divestiture of the stock; but I am concerned about how far Congress ought to go in compelling the surrender of stock which has been acquired legally. It seems to me that your statement up to this point indicates that you are opposed in toto to this legislation—and that is all right—but, if the committee should decide against you on that, it seems to me that some constructive criticism of the bill itself might be of help to the committee.

Mr. FITZPATRICK. Well, as to that, Mr Mapes, I have approached the consideration of this bill rather from this viewpoint, that here is a bill brought out and that I could be of more service to the committee, if I can be of any, to put my finger on what appears to me to be the weak spots in it, and that is all I have attempted to do.

Mr. MAPES. If the committee should decide on the policy of the legislation, then you have no particular criticism to make of the language of the bill, is that your position?

Mr. FITZPATRICK. Well, I would not go so far as to say that. If this committee decides that a bill of this sort is to be passed, or be offered to the Congress for passage, there are some things in the bill which I think should be changed, but the fundamental principle of the bill, Mr. Mapes, in my judgment, is so far from right that I do not see how mere language can help it.

Mr. MAPES. In other words, you do not care to discuss those provisions?

Mr. FITZPATRICK. Not at this time.

Mr. MAPES. Which you think ought to be changed?

Mr. FITZPATRICK. Not at this time.

Mr. MAPES. But, after the hearings are closed, it will be too late to discuss this before this committee.

Mr. FITZPATRICK. But, I say this, this is my position: When any bill is passed, or attempted to be passed, the thing that the legislature has to do is to say what is the evil, what is the necessity for a bill; what do we want to accomplish, and if the things desired to be accomplished are set out in this bill, I can not see how a mere change in verbiage is going to affect it very much.

Mr. SHALLENBERGER. I would like to ask one or two questions.

The CHAIRMAN. Mr. Shallenberger.

Mr. SHALLENBERGER. I have been most interested in the clear manner in which you have presented your argument.

I understand that you hold that there is nothing in the law or the Constitution that would prevent a holding company or an individual from acquiring the controlling stock in all of these 4-party railroads.

Mr. FITZPATRICK. No; I did not say anything to that effect, Mr. Shallenberger, because if there were such a thing proposed, we would have to deal then, certainly, with the various provisions of the Clayton Act.

Mr. SHALLENBERGER. The Clayton Act?

Mr. FITZPATRICK. Yes.

Mr. SHALLENBERGER. I thought you said that the law did not deny the right of ownership by a holding company.

Mr. FITZPATRICK. A holding company has no more power than an individual. A holding company, so-called, an investment company, a bank, or anybody else, can not have any more power with regard to the acquisition of property than the individual has, and I do not see how a holding company could go in and acquire properties which were in opposition to the law as it now stands, and be exempt from the provisions of that law.

Mr. SHALLENBERGER. Well, some of those holding companies hold a very material interest in the several railroads that they are not operating.

Mr. FITZPATRICK. Yes.

Mr. SHALLENBERGER. And, I understand you hold that it is not a fair principle of law for this committee to attempt to establish or recommend a law that would require them to divest themselves of those holdings.

Mr. FITZPATRICK. I have mentioned the concrete case of the properties with which I am connected.

Mr. SHALLENBERGER. If they held a majority of the stock of these different companies, which I understand they do not now hold, but if they actually held 51 per cent or more, would that be in opposition to the Clayton Act?

Mr. FITZPATRICK. No; not unless it came within the purview of that language, that there was no restraint on commerce.

Mr. SHALLENBERGER. So it could, under that interpretation, acquire control, and it would be up to somebody to show that it was in violation of the Clayton Act?

Mr. FITZPATRICK. Well, provided they were going to fly in the teeth of the law; yes.

Mr. SHALLENBERGER. I do not see exactly where you differentiate between the holding of 25 or 40 or 30 per cent, or whatever they hold, and the holding of 50 per cent, or 51 per cent.

Mr. FITZPATRICK. The Clayton Act provides:

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them.

Mr. SHALLENBERGER. Under that provision?

Mr. FITZPATRICK. That and the provision in the Sherman law, which is to the effect that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

And so forth.

Now, in any stock acquisitions, particularly stock acquisitions where the question of the Interstate Commerce Commission is concerned, those laws have to be held in mind.

Mr. SHALLENBERGER. Well, of course; but there has been discussion here several times, perhaps you heard it, to the effect that the transportation act apparently attempted to lift the provisions of the Clayton Act and the Sherman Act, with regard to consolidations.

Mr. FITZPATRICK. After you have filed proper petitions and submitted yourselves to the jurisdiction of the Interstate Commerce Commission, and had hearings, and the commission has found that this great thing which is of supreme importance to the public interest, is to be be served, then we may proceed.

Mr. SHALLENBERGER. Then, you do not hold that applies to the actions of a holding company, they are not relieved from the antitrust laws unless the Interstate Commerce Commission has approved it, as a part of the plan?

Mr. FITZPATRICK. So far as railways are concerned.

Mr. SHALLENBERGER. So far as holding companies are concerned.

Mr. FITZPATRICK. Railroads must go to the commission. So far as other individuals are concerned, the commission has no jurisdiction over them.

Mr. SHALLENBERGER. I wanted to get that point clarified. You believe that a holding company that has been formed without the consent of the commission, is not removed from the penalty of the antitrust law at present?

Mr. FITZPATRICK. No, sir.

Mr. SHALLENBERGER. Well, that is all I want to ask.

Mr. NELSON. Mr. Fitzpatrick, I would like to ask you a question. I was not able to hear your testimony yesterday. I regret it very much. It was not possible for me to get here.

Now, the Sherman Act and the Clayton Act, of course, were passed before we adopted our present policy as to railroad consolidations.

Mr. FITZPATRICK. Yes.

Mr. NELSON. And they probably were intended as a check upon what we are now engaged in trying to do, were they not?

Mr. FITZPATRICK. Well, in so far as your question refers to the subject of putting together competing lines of railroads with the consent of the commission, that is quite true.

Mr. NELSON. That is what I had in mind.

Mr. FITZPATRICK. Yes.

Mr. NELSON. Well, now, is it your position that, Congress having determined that it was in the public interest that the roads should be consolidated, and having determined in what method the consolidations of the roads would be in the public interest, certain roads or certain holding companies, may, by indirection, go ahead and do what they could not do by direction, and make virtual consolidations that the commission had denied? Is that your position?

Mr. FITZPATRICK. No; of course, it is not my position, because I think that the facts are very different.

Mr. NELSON. Well, let me ask you this: Having determined the policy of the country to be that we should have consolidations, and having determined what the wise consolidation is, is that a proper subject of interstate commerce in regard to which we have power to legislate?

Mr. FITZPATRICK. You may.

Mr. NELSON. To see that that consolidation was properly carried out?

Mr. FITZPATRICK. You mean that Congress has adopted as a national policy of consolidation.

Mr. NELSON. Yes.

Mr. FITZPATRICK. It has directed the commission to promulgate a plan.

Mr. NELSON. Yes.

Mr. FITZPATRICK. The commission has promulgated a plan.

Mr. NELSON. Yes. Now, is that a proper subject upon which we can legislate?

Mr. FITZPATRICK. I think so.

Mr. NELSON. In the regulation of interstate commerce?

Mr. FITZPATRICK. I think so.

Mr. NELSON. And, in carrying out that object our powers are plenary?

Mr. FITZPATRICK. So far as the Congress deals with the question of interstate commerce its powers are plenary.

Mr. NELSON. Well there is a proper question, is there not?

Mr. FITZPATRICK. I think so.

Mr. NELSON. We have determined upon proper consolidations, and we have determined upon the method. Now, our powers are plenary?

Mr. FITZPATRICK. I think so.

Mr. NELSON. Well, if that power is plenary, and somebody attempts, indirectly by a holding company or any other method, to do exactly what we have told them not to do——

Mr. FITZPATRICK. Well, I do not think that that is the situation, and I do not think it can be done, and I do not think that that is just exactly the question to which the committee is addressing itself.

Mr. NELSON. Assuming what you say is correct, and they did do it, with plenary powers to devise a plan, and carry it out, what can we do?

Mr. FITZPATRICK. If this committee desires to change the policy of voluntary consolidations which is now carried into the act?

Mr. NELSON. No; that was not my question, Mr. Fitzpatrick.

Mr. FITZPATRICK (continuing). Into involuntary consolidations or compulsory consolidations. That is a question for the consideration of this committee——

Mr. NELSON. My question was this: Assuming that it is proper for us to determine that we want consolidation, that we want a particular form of consolidation, and that this is a proper subject and we have plenary powers, how far can we go in seeing that our purpose is carried out?

Mr. FITZPATRICK. See that consolidations were effected.

Mr. NELSON. Yes; and see that nobody did indirectly what they could not do directly.

Mr. FITZPATRICK. Why, Congress has complete control, as I understand the law, over the subject of consolidations.

Mr. NELSON. But, we have no right to interfere with anybody's holdings, although those holdings are private, and although in reality they are used to control other roads, contrary to the rules and orders of the commission; that is it, is it not?

Mr. FITZPATRICK. As I see it, if you are dealing with personal holdings, which have no relation to interstate commerce, and not dealing with the instrumentalities, then you are dealing within your powers.

Mr. NELSON. Although in truth and in fact, they are controlled, directly or indirectly, by methods by which the commission said they should not be controlled; that is the case?

Mr. FITZPATRICK. I do not know of a single case——

Mr. NELSON. That is not the question, whether you know, but your position still is that those are private holdings and it is none of our business?

Mr. FITZPATRICK. Well, I say this, that the holdings which are beyond the pale of interstate commerce are not subjects of congressional regulation. Before the Congress can reach any subject of regulation, it must have a direct and substantial relation to interstate commerce.

Mr. NELSON. Well, consolidation of roads is proper. That is a subject that we have plenary powers over, and that is what we are trying to do, and that is what we found that we did not do, because they are taking advantage of the law through holding companies, and consolidating otherwise than as approved by the commission.

Now, you say we are powerless because these are individual holdings. That is your position, as I understand it.

Mr. FITZPATRICK. What I say is as to the question of consolidation, I think that Congress has plenary power, but that does not mean that the Congress has plenary power as to matters which do not relate directly and substantially to interstate commerce. That is my position.

Mr. NELSON. Then, assuming that it was properly determined to have consolidation of roads and assuming that we have fixed on a definite plan which we believe is in the public interest. Now, would we have the power, so far as future holding goes, which might impair that plan, would we have the power, as far as future holdings go, to say that they must be passed upon by the commission, and make that requirement?

Mr. FITZPATRICK. Provided you are dealing with the subject of interstate commerce.

Mr. NELSON. I am dealing with the subject of consolidation, which you say is one.

Mr. FITZPATRICK. I am quite certain when you are dealing with the subject of interstate commerce, you are dealing with one, but I——

Mr. NELSON (interposing.) I am dealing now with the subject of consolidation, and I am dealing with the particular plan we have assumed to exist, for consolidation. We have got a particular plan.

Mr. FITZPATRICK. When you are dealing with interstate commerce. I evidently am not making myself clear.

Mr. NELSON. Yes you are.

Mr. FITZPATRICK. When you are dealing with the subject of interstate commerce, you have full plenary power, but when you pass beyond that——

Mr. NELSON. Let me ask a specific question. Let us not keep on talking in generalities. That does not get us anywhere.

We have a plan for consolidation of the roads.

Mr. FITZPATRICK. Yes.

Mr. NELSON. We have a particular plan which we believe is absolutely essential for the public good.

Mr. FITZPATRICK. Yes.

Mr. NELSON. Now, have we not the right to say to anybody who is acquiring stock in the future that it shall be subject to the approval of the commission, to the end that we may carry out this plan?

Mr. FITZPATRICK. Anybody who acquires stock?

Mr. NELSON. Anybody; yes.

Mr. FITZPATRICK. I do not think so.

Mr. NELSON. Well, who can we put our fingers on? Would you say that there was anybody involved?

Mr. FITZPATRICK. If you are going to put, by proper statute, a power of condemnation in the public utilities, which is the——

Mr. NELSON. I am not talking about condemnation. I am talking about passing on the propriety of their acquiring and managing.

Mr. FITZPATRICK. I say, if you are considering the question of the condemnation of stock held contrary to public interest, that is one thing, but this bill is not doing that. This bill is simply ordering people who hold stock, legally acquired, to divest themselves of it.

Mr. NELSON. I got that from your testimony. What I want to know is, having determined on consolidation, and having determined on the plan, can we not pass some restriction upon those who want to buy stock in the furure to the effect that they shall have it passed on by the commission?

Mr. FITZPATRICK. I do not believe that you can pass any sort of regulation which will affect the personal holdings of stock which are not in interstate commerce.

Mr. NELSON. Stock. That is exactly what I wanted to know, if you do not think under our plenary power to regulate commerce, we can pass a law to the effect that those who want to acquire stock in the future shall have it passed upon by the commission?

Mr. FITZPATRICK. I do not think so.

Mr. NELSON. That is all, Mr. Chairman.

Mr. HUDDLESTON. I want to ask a question. Mr. Fitzpatrick, I am anxious to know just what your views are of existing law of consolidation. Just what consolidations are permissible under the law as it now stands?

Mr. FITZPATRICK. Any consolidations which are in conformity with the plan of the commission.

Mr. HUDDLESTON. That is one. What else?

Mr. FITZPATRICK. All consolidations, Mr. Huddleston, must be in conformity with the plan of the commission.

Mr. HUDDLESTON. Then, the transportation act of 1920 prohibits any and all consolidations, unless the approval of the Interstate Commerce Commission is obtained.

Mr. FITZPATRICK. The transportation act of 1920 had to do with the instrumentalities of commerce, which are therein set out as being under the jurisdiction of the commission. The Congress took up this great question of consolidations and passed a law and said that so far as the consolidations of railroad properties were concerned the commission had a specific duty to do certain things and that one of those was a promulgation of its plan, and after that plan is promulgated, any consolidations of the railroad properties must be in conformity with that plan.

There was not a mandate put on the railroads to consolidate. It was left in such a way that the individual carriers, if they desired, might consolidate. If they did not, there was no way to make them consolidate, but if they desired, that was to be carried out, carried into action, then it must be in confornity with the plan. It is not an illegal thing not to do it.

Mr. HUDDLESTON. Did you hear Mr. Potter testify?

Mr. FITZPATRICK. No, sir; I did not. I was not able to be here.

Mr. HUDDLESTON. The view has been expressed before the committee that the act of 1920 was enabling merely, that it lifted the prohibitions of the antitrust laws in certain respects, where approval of the commission could be granted, that it did not of itself forbid any consolidations which had previously been legal.

The view as expressed was that consolidations prior to 1920 were legal unless they were violative of the antitrust laws; that is, that consolidations were permissible where there was no impairment of competition, and so on.

Now, do I understand correctly that it is your view that those perfectly legal consolidations were made illegal by the act of 1920?

Mr. FITZPATRICK. That any consolidations of railroad properties which had been made under the law?

Mr. HUDDLESTON. Were consolidations which did not violate the antitrust laws, were legal prior to 1920?

Mr. FITZPATRICK. Yes.

Mr. HUDDLESTON. Have they become illegal by virtue of the act of 1920?

Mr. FITZPATRICK. May I just, a little at length, say what my position is about that?

Mr. HUDDLESTON. Yes.

Mr. FITZPATRICK. It really comes down to the question as to whether the paragraph (2) of section 5 is permissive or mandatory. And, coupled with that, the construction of the subsequent provisions of the act, with regard to consolidations.

Now, I can not state anything except my personal opinion about the law. There are two schools, seemingly, I think it may be fairly said, of legal thought with respect to paragraph (2) of section 5. A great many lawyers in this country think that that is a permissive section. A great many think that it is a mandatory section. Most people think that there is no direct and controlling decision of that question by the court of last resort. I incline to the opinion that (2) of 5 is not permissive, but is mandatory, and that since the passage of that act, if a carrier wanted to acquire the control of another, that it could go to the commission to acquire that control.

Now, then, as to the other question, which is involved, the question of consolidations, I think that prior to the time that the commission promulgated its final plan, which in December, 1929, it was perfectly legal under the statutes of the States to consolidate railroad properties, provided they did not run counter to the then existing law.

Mr. HUDDLESTON. What do you mean by that?

Mr. FITZPATRICK. The antitrust statutes. But after the commission promulgated its final plan, I do not believe that a consolidation under State statutes can be made effective without the approval of the commission. I would say, under circumstances of that sort, that the machinery would be, I would say, this: That if two railroad properties, X and Y, were to be consolidated, one was an Ohio company, or maybe both of them Ohio companies, that your machinery, your legal machinery, for consolidating those two companies would be the State machinery, because there is no Federal machinery set up. You would take such action as might be necessary, by the stockholders of both companies, but the resolutions would show that certain things were to be done upon the approval of the commission and you would then come to the commission with your petition for the approval of that consolidation.

Now, that is my theory of the law, but I can not say to this committee that all of the lawyers of this country agree with me about that. Many of them do not.

I think that answers your question, though somewhat at length.

Mr. HUDDLESTON. Your view is that two noncompetitive roads, can not now consolidate without the approval of the commission?

Mr. FITZPATRICK. Under State authority?

Mr. HUDDLESTON. Under any authority.

Mr. FITZPATRICK. Yes, sir; that is my view.

Mr. HUDDLESTON. What is the penalty for attempting to do so?

Mr. FITZPATRICK. Well, I find no penalty.

Mr. HUDDLESTON. Is the transaction invalid? Let me state a concrete case: Carrier A buys all of the stock of carrier B, a noncompetitive line, then says nothing to the Interstate Commerce Commission about it. You have just said that you think that that transaction is illegal under the act of 1920?

Now, what is the effect of the illegality? Does the title to the stock not pass? There is no criminal provision of the law. It is not criminal, but just in what way would it have application?

Mr. FITZPATRICK. There is, as you say, there is no penalty, and it is not a crime. There is not any criminal statute, because the carriers are in the clear, but all of those carriers are subject to the control of the commission and just as soon as carrier A came to the commission with regard to the issue of securities, or just as soon as it came to the commission with regard to a capitalization, of that expense, right then it would be in difficulty.

Mr. HUDDLESTON. But until it invokes the aid of the commission, what is the commission to do?

Mr. FITZPATRICK. It can not get anywhere; it can not have joint directors; it can not have common officers; it can not have anything in common. It is just simply a paper putting together of the properties.

Mr. HUDDLESTON. Is it your view that that provision of the act is constitutional; has Congress the power in regulating interstate commerce to pass a law forbidding that one corporation should acquire the stock of another noncompetitive corporation, where the corporation acquiring the stock has authority under its charter to make the acquisition?

Mr. FITZPATRICK. Both being engaged in interstate commerce?

Mr. HUDDLESTON. Yes.

Mr. FITZPATRICK. Yes.

Mr. HUDDLESTON. So that Congress can forbid that one carrier engaged in interstate commerce may acquire the stock of another carrier engaged in interstate commerce, but Congress, according to your view, can not forbid a third corporation, or individual from acquiring all of the stock of both of the carriers.

Mr. FITZPATRICK. Congress, in both first cases is dealing with the instrumentality of commerce; Congress in the second case is not dealing with the instrumentality of commerce in any way.

Mr. HUDDLESTON. Your view then, is that Congress may regulate the instrumentality of commerce, but not the agency of commerce?

Mr. FITZPATRICK. My view is that all interstate commerce, of course, is subject to the control of Congress, and, of course, subject in so far as they designate to be so, to the control of the Interstate Commerce Commission; but individuals who are not in interstate commerce or individualities, are not subject to that regulation.

Mr. HUDDLESTON. The antitrust laws were passed in the exercise of the constitutional function to regulate commerce.

Mr. FITZPATRICK. Yes, sir.

Mr. HUDDLESTON. They dealt with stock ownership in competing corporations, and had to do with competition.

Mr. FITZPATRICK. And restraint in trade.

Mr. HUDDLESTON. Is it your view that the power to regulate commerce has relation merely to the preservation of competition?

Mr. FITZPATRICK. Oh, no.

Mr. HUDDLESTON. I hope Mr. Beck will pardon me from dissenting with his expression that Congress may prohibit commerce. I do not believe that Congress can "prohibit" commerce, a commerce in legitimate objects. I do not think it has that power. I do not think "regulation" includes "prohibition." He may have the authority on his side, but I am not prepared to agree to that.

Mr. BECK. If my collegaue will permit me, in the latest case, in 181 U. S., the power to prohibit was recognized, although it is fair to say that that was dealing with lottery tickets, and Judge Harland wrote that opinion.

Mr. HUDDLESTON. And, also in dealing with liquors and other objects which are held violative of public policy; dealing with narcotics and other things, of an inherently dangerous or vicious nature undoubtedly there can be prohibition But may we prohibit the shipment of bread from one State to another under the powers to regulate interstate commerce? It would take a good deal more than the lottery case to convince me of that

Mr. BECK. I do not mean to say that the lottery case went that far, because it expressly said that the power should not be arbitrary.

Mr. HUDDLESTON. I think that there is a very broad distinction right on that point.

Now, since I have said so much, may I say further that I think the real purpose of the constitutional power to "regulate" is to facilitate commerce, to develop, to encourage, even to foster it. To prevent interference and undue restraint is quite the reverse of prohibition.

But, dealing with the subject in that way, if we may deal with the aspect of regulation so as to preserve competition, you say we have not exceeded our function, we may proceed to another aspect, and if we may assume the purpose of the Constitution is to enable Congress to facilitate and encourage, why may it not be said that Congress may adopt such measures as are reasonably calculated to promote those ends?

I ask your consideration of that in connection with your view that Congress must confine itself merely to the particular instrumentalities of commerce instead of extending into the field of agencies. For illustration, I have in my mind that under the power to regulate commerce we chartered railroad corporations. I know of no reason why the Congress may not charter other kinds of corporations for the purpose of interstate commerce. We provided for the method of transferring the stock and how the stock should be subscribed, and various other details with regard to these corporations engaged in transporting commerce.

I am bringing this to your attention with the view to invoking your thought in that field.

Mr. FITZPATRICK. Well, of course, what you are saying, Mr. Huddleston, resolves itself into this, just exactly what the word in the Constitution, "regulate," means.

Now, to say that regulation means to foster and that Congress may exercise all of its powers to foster rather than to exercise its powers to regulate, and by regulation to prevent the things which are supposed to be harmful to interstate commerce, in my judgment, is going rather far afield.

Mr. HUDDLESTON. Passing from that, may I ask, what is your interpretation of the Northern Securities case?

Mr. FITZPATRICK. Well, on this, of course, the Northern Securities case is a case under the Sherman Act, and it is based on a theory that a situation was there created by the two constituent united companies, which interfered—using a very mild expression—with interstate commerce.

Mr. HUDDLESTON. What were the facts in that case?

Mr. FITZPATRICK. The two railroads were in competition and they caused a company to be incorporated, the purpose of which was, as was said, the court further states the stock holdings of these competing companies disappeared as such for the moment, but immediately reappeared as stock holdings of a holding company which thereafter regarded the interests of both stocks as under and to manage or to cause to be managed both lines of railroads, as if held in one ownership.

Now, I discussed this question with more or less hesitancy, as my recollection is, and I do not think I am wrong, I think a member of this committee was in that case; were you not, Mr. Beck?

Mr. BECK. In the Northern Securities case?

Mr. FITZPATRICK. Yes.

Mr. BECK. Yes; I argued it in St. Louis.

Mr. FITZPATRICK. I thought Mr. Beck had argued it; but the facts in brief are that the two competing companies formed a company which was known as the Northern Securities Holding Co., and the conclusion drawn from that situation by the Supreme Court under the Sherman antitrust law.

Mr. HUDDLESTON. The power of Congress to deal with a situation of that kind was sustained?

Mr. FITZPATRICK. Yes.

Mr. HUDDLESTON. Congress had power to forbid the ownership by a holding company of competing carriers.

Mr. FITZPATRICK. Yes.

Mr. HUDDLESTON. You think that is sound?

Mr. FITZPATRICK. Well, there was a dissent, not exactly on that ground, but I raise no question as to the power of Congress in the passing of the Sherman Act, and that was the law of the Sherman Act.

Mr. HUDDLESTON. Then, given a case, we will say, in which the Alleghany Co., which is one of your constituents——

Mr. FITZPATRICK. Yes.

Mr. HUDDLESTON. Was organized for the deliberate purpose of acquiring two competing lines. Congress would have jurisdiction to deal with that situation, would it not?

Mr. FITZPATRICK. If you are applying that to the Alleghany, you are not quite right in your statement of fact.

Mr. HUDDLESTON. Well, I do not pretend to be right. I am just assuming a case.

Mr. FITZPATRICK. If you say a company.

Mr. HUDDLESTON. Well, I want to make it concrete. If you have got a better illustration, I wish you would state it.

Mr. FITZPATRICK. I have no better illustration, except when you say with respect to the Alleghany Co., it was organized for the direct purpose of acquisition of two competing lines, why, the facts hardly bear that out, and that is the reason I was saying, trying to change the question, and say that if a company could be organized for the direct purpose of acquiring the control of the competing lines, and that company goes into that business, that company is bringing itself to where the Sherman Act, or the Clayton Act, may reach it. That is all.

Mr. HUDDLESTON. Or where Congress, by new laws, may reach it. In the exercise of similar constitutional power?

Mr. FITZPATRICK. In the exercise of similar constitutional power.

Mr. HUDDLESTON. Yes, sir.

Mr. FITZPATRICK. Well, if Congress in its new law is dealing with a subject which has direct relation to interstate commerce, yes; if not, no.

Mr. HUDDLESTON. That gets me rather higher up in the air. I want to come down to the ground and talk about some concrete case.

But, we agree, as I understand, that in the case of the holding company chartered for the purpose of acquiring competing railroad lines, Congress has power under the Constitution to deal with that situation and to forbid it.

Mr. FITZPATRICK. It seems to me that Congress has dealt with it.

Mr. HUDDLESTON. But, if the holding company was organized to acquire the stock of noncompetitive carriers, Congress would not have the constitutional power to deal with it; is that right?

Mr. FITZPATRICK. I can not answer that, Mr. Huddleston, except by the statement that Congress has the power to deal with interstate commerce, and if there is such direct connection with it, and it was interstate commerce, why, yes; but if you are dealing with an instrumentality that is not in interstate commerce, to start with,

and you are dealing with nothing except the ownership of stock, then, in my judgment, no.

Mr. HUDDLESTON. Yet Congress has done just that thing in this section 5 of the act of 1920, has it not?

Mr. FITZPATRICK. I think not.

Mr. HUDDLESTON. It dealt there with a case of the acquisition of ownership of noncompetitive roads.

Mr. FITZPATRICK. By whom?

Mr. HUDDLESTON. By carriers.

Mr. FITZPATRICK. By carriers engaged in interstate commerce, an instrumentality of commerce.

Mr. HUDDLESTON. Just what effect does that have; just what figure does that cut?

Mr. FITZPATRICK. Why, in my judgment, it is a very important matter, because Congress certainly has a right, in my judgment, to direct its legislation to the admitted vehicles, you might say, or the admitted instrumentalities of commerce.

Mr. HUDDLESTON. And, the carrier corporation is an instrumentality of commerce.

Mr. FITZPATRICK. Yes; and under the jurisdiction of the commission.

Mr. HUDDLESTON. But a holding company, owning the stock of that carrier, is not an instrumentality of commerce?

Mr. FITZPATRICK. But the railroad is not an instrumentality of commerce because it has stock in this, that, or the other thing. It is an instrumentality of commerce, because it is engaged in interstate commerce. The point that I am making, that as compared with that situation, you want to take a company which is not in interstate commerce and by reason of the mere fact that it happens to own some stock in a company that is in interstate commerce, say that it is an instrumentality of interstate commerce.

Mr. HUDDLESTON. This Northern Securities case has struck down the holding company transaction. The holding company was not, according to your definition, engaged in interstate commerce. It was not an instrumentality of interstate commerce.

Mr. FITZPATRICK. According to my definition, I beg to differ with you, again, because the facts in that case were that the constituent carrier organizations organized a corporation which they owned and controlled for the purpose of controlling and operating or managing two competing lines.

Mr. HUDDLESTON. Then, the jurisdiction of Congress under the Constitution rests upon the grounds of who organizes the holding company, and what the purpose was in organizing it.

Mr. FITZPATRICK. No; not who may organize it; not entirely the personnel, although both of those must be in the consideration of any situation; both are important factors.

Mr. HUDDLESTON. That is all.

Mr. HOCH. Mr. Chairman.

The CHAIRMAN. Mr. Hoch.

Mr. HOCH. May I pursue that inquiry just a little further?

Mr. FITZPATRICK. Yes, sir.

Mr. HOCH. Now, you concede, of course, that the holding company is subject to the antitrust act.

Now, take the case of stock ownership of carriers by a holding company where the antitrust act is not involved. Is it your position that there is no case where the ownership of railroad stock by a holding company, not directly engaged in interstate commerce, even though that ownership should be a majority ownership, where that ownership would be subject to the power of the commission? Do you take the position that there is no set of circumstances where Congress would have power to assert jurisdiction?

Mr. FITZPATRICK. If that ownership affects interstate commerce, yes; but not otherwise.

Mr. HOCH. Can you suggest to us any set of circumstances where you would be willing to concede that Congress has power to assert jurisdiction over the ownership of railroad stock by a holding company not engaged directly in commerce?

Mr. FITZPATRICK. If you are dealing only with the subject of ownership, then I do not see how you can do it, Mr. Hoch; but if you are dealing with ownership coupled with a utilization, you may say, if that ownership is such that interstate commerce is affected, then you come straight back to the principle of the Clayton Act, or the Sherman Act.

Mr. HOCH. Yes; but can you suggest to us any circumstances where, in your view, there would be such a utilization of that stock as would subject it to the jurisdiction of Congress?

Do you have in mind any instance under which you could concede that Congress would have power to assert jurisdiction over a holding company, not engaged in interstate commerce, in the ownership of stock, not involving the antitrust acts?

Mr. FITZPATRICK. If I may phrase it in another way, is not that this, can I see how the terms of the Sherman Act or Clayton Act can be broadened, and I say I do not see how you can broaden it.

Mr. HOCH. No, I do not have in mind the broadening of the antitrust acts. I have in mind the limit of power of Congress in the regulation of commerce, to say nothing about restraint upon commerce now—the regulation of commerce, in supervising acquisition by an investment company, or a holding company of ownership of stock that is not a restraint upon commerce.

Mr. FITZPATRICK. I do not see how it is possible. If I appreciate correctly the constitutional limitation is for Congress under the commerce clause to deal with the subject which is beyond interstate commerce, and which does not directly touch interstate commerce.

Mr. HOCH. Then, from a practical standpoint, we might as well have absolutely no power in Congress in this case.

Mr. FITZPATRICK. Possibly so.

Mr. HOCH. Now dismissing the constitutional problem, let us look at the practical side of this situation: Congress has declared a policy that the unification of two or more carriers shall be unlawful unless effectuated in a certain manner with the approval of the commission, and that has to do with unification, not simply of competing carriers, but noncompeting carriers.

Now, if that is a wise policy in the public interest, does it not seem an incongruous situation that we should permit a holding company to effectuate a control even of non-competing carriers, in contravention of the policy set out with reference to the unification of the carriers themselves.

Mr. FITZPATRICK. Again, I would be somewhat at variance with the statement of fact, but passing that, I would say that I see, so far as I am personally concerned, I see no reason why, if it be your thought that the great national policy, if it be in the public interest, so that it may be effectuated, and that it should not be allowed to stand simply an unused thing. I would say there is no reason why the major carrier in any group, in accordance with the commission's plan, should not, with the proper machinery, set-up, have the right to take under such proceedings as would be in accordance with due process of law, the stock of any individuality for the public use.

Mr. HOCH. I do not mean to get into the question of compulsory consolidations.

Mr. FITZPATRICK. Exactly.

Mr. HOCH. I did not exactly have that in mind, but now if your position from a practical standpoint is correct, with reference to limitations of power of Congress over the holding company, then we run right up against a stone wall, it seems to me. Under the plan of voluntary consolidations, we simply declare that no unification, even of noncompeting carriers, shall be lawful unless carried out under the terms of the law with the approval of the commission; but we permit a holding company, which is without the pale of the power of Congress to do the very thing which we have declared to be unlawful.

Now, it seems to me we have either got to find a way to assert a constitutional power over the holding companies, or we have got to go to compulsory consolidations if we are going to make any headway.

Mr. FITZPATRICK. Of course, the holding company is not doing anything, Mr. Hoch, anything more than an individual has always had the right to, and may have, done.

Mr. HOCH. I draw no distinction in my question between the individual and the holding company. I am simply attempting to direct attention, to what seems to me, to be a practical situation, which we face in carrying out a national policy, if your statement of the limitations of the constitutional power is correct.

Now, may I ask one more question? I do not want to take too much time. I want to ask one question with reference to this divestiture provision on page 7.

Now, as I read that provision, it provides not simply for divestiture of stock where an actual control has been secured by holding companies, but is provides for a divestiture of any holding of stock.

Mr. FITZPATRICK. That is right.

Mr. HOCH. To quote the language here, in line 4, beginning on line 4, page 7, which provides for divestiture of any stock.

Mr. FITZPATRICK. Would you not begin with line 1, Mr. Hoch?

Mr. HOCH. Page 7?

Mr. FITZPATRICK. Yes, where the holding by any person of any part.

Mr. HOCH. Yes, beginning there, but the particular language I want to call attention to is the language from line 4 on, beginning in line 1:

Whether the holding by any person of any part of the stock or other share capital of any carrier (unless acquired before February 28, 1920, or unless acquired with the approval of the commission) is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier.

Now, I call particular attention to the last two lines that I have read:

by reason of subjecting such carrier to the control, domination, or influence of another carrier.

Now, if the word "influence" was not in there, I think it might well be contended that this provided for no divestiture except in case of control, but when you introduce the word "influence," I am uncertain as to what ownership, what amount of ownership of stock, might be held to be an influence that would hinder the carrying out of consolidation in harmony with the plan.

Now, assuming that Congress should provide for divestiture, have you any suggestion to make as to the limitations we should impose upon this power to compel divestiture, whether we should simply provide for divestiture in cases where holding companies had acquired control. The bill seems to go pretty far in this paragraph where it provides that if, in the judgment of the commission, any ownership of any holding company constitutes an influence which would tend to hinder the carrying out of the plan there shall be divestiture. Have you got any suggestions about that?

Mr. FITZPATRICK. I have not considered any amendments, which at this time I might suggest, to the bill, or any change in the verbiage of the bill.

I say that—just as you say—that as drawn, it seems to me it is sufficiently broad to reach 10 shares or a thousand shares, provided the commission is of the opinion that the holding of the particular number of shares should do what is here said, subject the carrier to control, domination, or influence of another carrier.

And when you read that provision, Mr. Hoch, please read it in conjunction with (A) (a), (B) (b), and (C) (c), which reaches the so-called individuals affiliated with the carrier, and then note the breadth of the provision and the power given to the commission in determining what an affiliated person is. A circumstance such as this comes to mind. You are on the board of directors of X carrier, or you are a stockholder of X carrier, and the carrier X buys stock of a certain railroad. You may have had your stock long or you may buy them subsequently. Are you an affiliated person, or if you are a stockholder and Mr. Beck, if I may be pardoned, is a stockholder, and you are a stockholder, are you affiliated persons coming under the statute? In other words—and I call the attention of the committee to the seriousness of those provisions, and the high desirability of knowing just exactly what they mean.

Mr. HOCH. Just one more question right on that. I am not sure, Mr. Fitzpatrick, whether it was in your testimony that some reference was made to the word "independence," but I will ask you what you think that has reference in line 7, "impairing the independence to one of another, of the systems."

Mr. FITZPATRICK. I had it in mind, and said this about that, as I recall. There is no present command to that effect in the law, but this is being carried into the law, and yet it is very difficult to say what that means if stocks are held by persons who are affiliated with the various systems.

Mr. HOCH. While the present law does not use the word independence, I think it is a clear interpretation that these systems that are to

be set up are to be independent because it uses the phrase "competing carriers," as I recall, in several places.

Mr. FITZPATRICK. If, in your mind, is this thought, that the competitive relations between carriers shall be kept independent and that that is all that is in your mind, why, that is a different story. I do not know, and I would like for you to say, if I may turn this thing around and ask you, just exactly what is in your mind as to the construction of independence?

Mr. HOCH. When I read that last, where it says "independence, one of another, of the systems," what I got out of that was just what I got out of the present law, that the commission was to bring about the unification of the carriers in the limited number of systems, competing between themselves, that is, each system would be independent of the others, and with no idea as I got from the law, of destroying competition between the systems. In fact, as I look at the railroad map, which the commission proposes, I would say, in a broad way, it provides very real competition. There may be some cases, like the New England case, where that is open to argument, but in a broad way, it seems to me you have these great systems, great network, covering the same territory, overlapping in many cases, and it seems to me that there is no evidence on the face of it that it is destructive of competition. Rather I view it as more virile competition between well-balanced systems. That is all I got out of the word "independence."

Now, if it means something else, I would like to know it. Do you not think, Mr. Fitzpatrick, that the present law does contemplate competing systems?

Mr. FITZPATRICK. Oh, yes.

Mr. HOCH. And independent in that sense.

Mr. FITZPATRICK. The language of the statute is, I think, competition shall be preserved in so far as possible.

Mr. CROSSER. Mr. Chairman.

The CHAIRMAN. Mr. Crosser.

Mr. CROSSER. Mr. Fitzpatrick, is not your conclusion this, that so far as the mere ownership of stock, is concerned the man who is the mere owner of stock, and is not engaged in interstate commerce——

Mr. FITZPATRICK. Mere ownership?

Mr. CROSSER. Yes.

Mr. FITZPATRICK. I will say this, the mere ownership of stock is a carrier by someone who is not engged in interstate commerce, not an instrument of commerce, is not within the power of Congress to regulate, if it be mere ownership, and nothing else.

Mr. CROSSER. That is what I mean. Well, the instrumentality necessarily would consist would it not, of the material things, or the mechanics used in carrying on interstate commerce?

Mr. FITZPATRICK. I beg your pardon.

Mr. CROSSER. I say, if we can regulate only the instrumentality, it is fair to interpret the term instrumentality as meaning the material things used in carrying on interstate commerce.

Mr. FITZPATRICK. That is quite true, and here I say we are talking about the railroads as railroad properties.

Mr. CROSSER. So that if one owned all of the stock, say, all of the stock of the Pennsylvania Railroad Co., and he were living in Idaho, the mere ownership of that stock could not be logically said to subject him to control.

Mr. FITZPATRICK. The mere ownership would not be.

Mr. CROSSER. In other words, it is the method and manner of utilizing the material and tanable property which can be regulated.

Mr. FITZPATRICK. It is. A relation that exists between ownership and interstate commerce in order to put it, as I see, within the power of Congress.

Mr. CROSSER. Well, could mere ownership, the mere status of owner, and nothing more be subjected to regulation by the Government?

Mr. FITZPATRICK. I think not.

Mr. CROSSER. I think that conclusion is necessarily the logical one resulting from your contention. That is all.

The CHAIRMAN. Any questions?

Mr. MILLIGAN. In Doctor Splawn's report, he has an organization chart, showing the control of the Van Sweringen companies, on the basis of ownership of voting stock, as of April 30, 1930 I wonder if there has been any material change in this percentage of ownership in these properties, referred to in that chart, since that date?

Mr FITZPATRICK I never have seen the chart, and I do not know what is in it I have not checked that.

What particular thing are you talking about, Mr. Milligan?

Mr. MILLIGAN. I was just wondering if there would be any material change in the percentage of ownership in those different properties, referred to in that chart.

Mr. FITZPATRICK. I can not say.

Mr. MILLIGAN. And, if it is possible for you to give to the committee any change in ownership.

Mr. FITZPATRICK. You mean, have we bought any new railroads, and sold any properties we had?

Mr. MILLIGAN. Yes.

Mr. FITZPATRICK. Have you a copy of the chart that you can let me see what it is?

Mr. MILLIGAN. Yes [handing chart to Mr. Fitzpatrick].

I noticed the other day, one of the witnesses, in testifying——

Mr. FITZPATRICK (interposing). I think I can make a very brief statement that will cover the situation.

I hear the bell ringing.

If this committee wants a statement showing the present railroad holdings of the Alleghany Co. and the Chesapeake Co., or the Virginia Transportation Co., and those are the companies which are necessary to complete the picture in the railroad particulars, I will be very glad to furnish it.

Mr. MILLIGAN. My idea was that this chart should be brought down to date. This one is under date of April 30, 1930.

Mr. FITZPATRICK. I can do that, if it be desirable, or if you wish it. It will take me some time to do it; until some time next week.

The CHAIRMAN. That wish has been expressed by several members of the committee.

Mr. FITZPATRICK. All right, I will do that. The statement referred to follows:

THE CHESAPEAKE & OHIO RAILWAY CO., THE HOCKING VALLEY RAILWAY CO., PERE MARQUETTE RAILWAY CO.

CLEVELAND, OHIO, *March 25, 1932.*

Mr. SAM RAYBURN, *Chairman,*
House of Representatives, Washington, D. C.

DEAR MR. RAYBURN: In accordance with the request recently in a hearing before the Interstate Commerce Committee in the House, I am now handing you the following information of stocks presently owned:

	Shares
The Chesapeake Corporation: Chesapeake & Ohio Railway Co., common	4, 066, 508
Alleghany Corporation:	
The Chesapeake Corporation, common	1, 248, 900
Lehigh Coal & Navigation Co., common	33, 546
Missouri Pacific R. R. Co., common	522, 900
Missouri Pacific R. R. Co., preferred	194, 100
Pittston Co., common	496, 240
Erie Railroad Co., common	215, 000
New York, Chicago & St. Louis R. R., common	167, 300
Virginia Transportation Corporation:	
Erie Railroad Co., common	769, 800
Erie Railroad Co., first preferred	151, 405
Erie Railroad Co., second preferred	60, 195
New York, Chicago & St. Louis R. R. Co., common	25, 100
Chicago & Eastern Illinois Ry. Co., common	131, 268
Chicago & Eastern Illinois Ry., preferred	64, 904
The Pittston Co., common	381, 250
Standard Carloading Corporation, common	450

With kindest regards, I am,
Yours truly,

HERBERT FITZPATRICK,
Vice President and General Counsel.

Mr. BECK. Mr. Chairman, I would like to ask a few questions before adjournment.

The CHAIRMAN. Go ahead.

Mr. BECK. Mr. Fitzpatrick——

The CHAIRMAN. Just a minute; Mr. Milligan has not finished.

Mr. BECK. I beg your pardon. I thought you had concluded.

The CHAIRMAN. I thought he was through.

Mr. MILLIGAN. I wonder if Mr. Heiserman will do the same thing for the Pennsylvania, the Pennsylvania Co., and the Pennroad.

Mr. HEISERMAN. Surely. I think I have it already here.

Mr. MILLIGAN. That is all.

The CHAIRMAN. That is all?

Mr. MILLIGAN. Yes.

Mr. BECK. As has been expressed, this is a very, very difficult question, of what is the right to regulate, and what is the right of ownership. Do you think, Mr. Fitzpatrick, that Congress could constitutionally pass a law to compel the consolidations of railroads?

Mr. FITZPATRICK. Again, we reach a very difficult subject. I can only express my personal opinion. I think that that, at least I am inclined to the opinion, that that is within the power of Congress. I express, of course, no opinion as to the desirability of it. I express no opinion as to the public interests that are involved, but as a naked legal proposition, it is difficult for me to conceive that if consolidation be a great public policy, and that it is desirable, that that public policy shall be effectuated, in the public good, then I would say that Congress, at least I would incline to the opinion, could accomplish that result, just exactly as if I owned a piece of property, it may be taken for the public good.

Mr. BECK. Yes; but then there is compensation. I am not referring to the eminent domain power.

Mr. FITZPATRICK. Do not misunderstand me to say that Congress could pass an act whereby private property could be taken without compensation.

Mr. BECK. That is a different proposition. What I wanted to ask was whether Congress could make its plan compulsory on the carriers.

Mr. FITZPATRICK. As I have said, I incline to the opinion it might.

Mr. BECK. Very well. Now, if it has such power and can delegate it to the Interstate Commerce Commission, could the Interstate Commerce Commission constitutionally, if it thought it desirable that the Pennsylvania and the New York Central should be one system, compel the owners of the Pennsylvania to sell to the stockholders of the Central all of their stock at what the commission regards as a normal market price?

Mr. FITZPATRICK. You have put quite a good many things in a single question, Mr. Beck, and without——

The CHAIRMAN. Your answer is that Mr. Beck should not go into all of that at this time.

Mr. FITZPATRICK. No. I would refrain from covering as much territory in a single answer as you have in a single question, without more consideration of that general subject, because there is so much to it.

Mr. BECK. Is it not conceivable, Mr. Fitzpatrick, that the power of regulation is so great that if the Interstate Commerce Commission thought it desirable that the New York Central and Pennsylvania should operate as one system, that they could order all of the stockholders of the Pennsylvania to transfer their stock to the New York Central?

Mr. FITZPATRICK. You remember, Mr. Beck, that a very distinguished judge, Marshall by name, said that the power to tax is the power to destroy.

Now, as to what the Supreme Court of the United States may say about the power to regulate, I refrain from expressing any opinion.

Mr. BECK. Let me just remind you of this; then I am through. In the Standard Oil case, which was an interstate commerce case, that a very elaborate opinion of the court by Chief Justice White, upheld to the full the so-called plenary power of Congress, but being very careful to say in that opinion that, while in respect to restraining commerce, it would have to respect the property rights of the owners of the Standard Oil Co.

The CHAIRMAN. Would not your answer be, come down to this, Mr. Fitzpatrick—and, I will say that I had several questions that I wanted to ask, which probably Judge Heiserman can answer for you, to-morrow—would not your answer come down to this, that there is some decision of the Supreme Court in which this statement is made, that the power of Congress over interstate commerce goes to the point, and only vanishes at the point of confiscation, that that is the only thing Congress, under the constitution, can not do with the railroads.

Mr. FITZPATRICK. Mr. Rayburn, when this question, what is for the public interest, comes in, I am in a very hesitant position about saying that Congress can not do things.

The CHAIRMAN. Your opinion is that Congress has power over interstate commerce, and its power is practically absolute, except that it does not have power to confiscate private property.

Mr. FITZPATRICK. My opinion is, as I have said before, when you are dealing with the instrument of commerce, that the powers are plenary, and that means fully.

Now, before you go, gentlemen, may I thank you for giving me an opportunity to appear before you, and as much time as you have, and the courtesies that you have shown me. I appreciate it.

The CHAIRMAN. Mr. Fitzpatrick, we want to assure you that this committee is always glad to hear and enjoys hearing witnesses of your type.

Mr. HEISERMAN. Mr. Chairman, am I right in assuming that I will have the privilege of appearing before you at 10 o'clock to-morrow morning?

The CHAIRMAN. You shall have the whole morning, Judge Heiserman.

Mr. HEISERMAN. Thank you very much.

(Thereupon, at 11.55 o'clock a. m., the committee adjourned, to meet the following morning, Friday, March 18, 1932, at 10 o'clock a. m.)

REGULATION OF RAILROAD HOLDING COMPANIES

FRIDAY, MARCH 18, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. Sam Rayburn, chairman, presiding.

The CHAIRMAN. The committee will come to order.

STATEMENT OF C. B. HEISERMAN, VICE PRESIDENT AND GENERAL COUNSEL PENNSYLVANIA RAILROAD CO., PHILADELPHIA, PA.

The CHAIRMAN. All right, Judge Heiserman, you may proceed in your own way.

Mr. HEISERMAN. My name is C. B. Heiserman, vice president and general counsel Pennsylvania Railroad Co., also representing the Pennsylvania Co., and appearing as attorney for the Pennroad Corporation. My address is 1740 Broad Street Station Building, Philadelphia, Pa.

Mr. Chairman, I should perhaps apologize for unduely dwelling a little while on the testimony of the Witnesses Wilder and Silverman in this case. But, mindful of the fact that you are making up a record here, and while this testimony, in my judgment, was entirely not germane to the subject generally, it was my desire to have Mr. Pelley and Mr. Ogden here. I want to say just a few words as a witness.

There has not been one step of the matter in connection with the consolidations of the railroads involved in the 4-party plan that I am not familiar with. I think I know, I am sure I know, if not what was in the minds of the executives, I know what they did, and I know of every understanding and every scrap of paper that figured in the transactions.

Now, referring briefly to Witness Wilder, on page 196 of the record of hearings, in which he says:

> Gentlemen, that the private agreement between the 4-party carriers should also be a part of the record. We, as individuals, as private individuals, have no means whatsoever of getting at those things. We have heard.

Mr. Nelson asks:

> What do you mean, that we should get copies of those?

Mr. Huddleston inquires whether they are in the files of the Interstate Commerce Commission, and he said they were not. Then, the next question, Mr. Nelson asks:

> Has the commission called for them?

Mr. Wilder says:

Not that I know of, and I doubt whether it has the power to. That is what I mean, sir, by "teeth" in this bill.

Now, Mr. Huddleston says:

You are able to say there are private agreements?

He had said there were private agreements. To that Mr. Wilder says:

To the best of my knowledge, there are private agreements. I can not say that I have seen them. There are, of course, outside of New England, as well as in New England, certain roads who are not happy with their allocation in these systems.

Mr. Huddleston then asks:

Are these agreements in writing?

Mr. WILDER. As far as I know, they are.

Mr. CROSSER. Have you any information that you think justifies you in saying that?

Mr. WILDER. I believe I have, sir; though I have not seen them.

Now then, he says:

For example, there was a trade by which the Chesapeake & Ohio gained access to the Manhattan Island by trackage over the Pennsylvania from Newark to the Pennsylvania Station, by the Lehigh Valley, and, while I can not actually testify to it, I know that they are using the ocean freight terminals in Jersey City.

Then, Mr. Wilder further says:

I think it is an agreement in restraint of trade by which New England roads were deprived of these bridge lines that the commission assigned to them.

And so forth. Now, what I want to say, particularly about that, is that Witness Wilder says he knows there are agreements. I say to you that there are no agreements except the agreement which is on file with the Interstate Commerce Commission, and which constitutes the application to the Interstate Commerce Commission in the so-called 4-party consolidation plan.

I want to say further that I speak of matters of this kind—well, first I will refer to the Witness Silverman a moment.

On page 216 of his testimony, in which he says in answer to Mr. Hoch's question:

I think, as I replied to the gentlemen on this side (Mr. Hoch), that you might be able to go over, and go after the Pennroad, if you can establish a violation of the antitrust laws, but you have an awful job to establish your case, bringing in any proof, because you are dealing with, perhaps, in the case of the Pennroad, one individual, as I have been led to understand with reference to the Pennroad Co., there is a certificate—this is merely hearsay—there is a certificate in the safe of General Atterbury whereby he controls the whole situation.

He has got one certificate, so I have been told—this is only imaginary—he has got a certificate in his safe that controls the whole situation, and how you are going to prove these things I do not know.

Now, I want simply to say as to that, that if the commission, if this committee, in its consideration of this case attaches one iota of importance to the testimony of the witnesses Wilder and Silverman, it seems to me that the committee is bound to inquire further into the matter and to have General Atterbury, who has been traduced in this testimony, appear before your committee and make a statement. Although as I say, I am familiar with all of the facts, and I say that the statements are unqualifiedly false.

Mr. CROSSER. You mean to say that there is no such certificate as he mentioned?

Mr. HEISERMAN. I beg your pardon.

Mr. CROSSER. You say that there is no such certificate as he mentioned?

Mr. HEISERMAN. I know that there is no such thing in existence; could not be.

Mr. NELSON. Will you tell us what that arrangement is for voting those certificates? I understand that the man who buys them certainly has no voting power; that is all vested in some other board or body.

Mr. HEISERMAN. You are talking about the Pennroad?

Mr. NELSON. That is what I understood you were talking about.

Mr. HEISERMAN. No, sir; I was not talking about it, and neither was he. He says that General Atterbury has in his safe a certificate which supports their claim that he has charge of or is dominating the situation in New England. That is what he is talking about.

I will come to the Pennroad.

Mr. NELSON. I think he means the Pennroad, and I think that he is talking about the Pennroad organization.

Mr. HEISERMAN. I do not think so. I think that he is talking about these voting trustee certificates.

Mr. NELSON. I think he was——

Mr. HEISERMAN. I beg your pardon.

Mr. NELSON. I think he was.

Mr. HEISERMAN. Well, if he was.

Mr. NELSON. Now, what is the arrangement under which those certificates are voted, if they are not voted by the man who owns them?

Mr. HEISERMAN. Would you indulge me, Mr. Nelson, until I come to discuss the Pennroad Corporation. If you will, we will come to that later on.

Mr. MAPES. Mr. Chairman, I should like to ask Mr. Heiserman a question.

The CHAIRMAN. Mr. Mapes.

Mr. MAPES. Mr. Heiserman, you, the president of the New Haven, Mr. Pelley, and Mr. Ogden, the vice president of the Pennsylvania, have all testified that certain statements that Mr. Wilder made were false, without any equivocation.

If it is not too speculative I should like to ask why, in your opinion, did he appear before this committee and make those statements? Have you any information about that?

Mr. HEISERMAN. Will you permit me to proceed, Mr. Chairman?

The CHAIRMAN. Go right ahead.

Mr. HEISERMAN. I would like, in answer to that question, or in referring to the question, because I do not care to answer it, I would like to refer to the letter which Mr. Ogden presented as a part of his statement, which was sent to him by Mr. Wilder, the letter being a copy to Mayor Curley of Boston.

Mr. MAPES. Mr. Ogden put that in the record, the other day.

Mr. HEISERMAN. He put that in the record, and I had him put it in the record for this sole purpose: Mr. Wilder testified that he was not employed, that he was not representing anybody, he was an amicus curiæ, he was a friend of the court.

Now, his testimony was that early in December—I have forgotten when—he said he saw Mr. Ogden, but on December 17, the letter was addressed to Mr. Curley, a copy of which was sent to Mr. Ogden. Thereafter, Mr. Wilder made an appointment to see Mr. Ogden. What he wanted to see Mr. Ogden about, we were not able to get very much information from Mr. Ogden on, except in a general way, except that he saw Mr. Wilder who said, "What can we do for the Pennsylvania Railroad?"

Now, this is a letter of Mr. Wilder to Mr. Curley, a copy of which he sent to Mr. Ogden, and asked him to consider it and give him his views.

I shall not read all of it, but he says:

It would appear that the ports would be best served and their maritime future be best developed if—

1. The Pennsylvania were to be permitted to own, operate, and complete the electrification of the New Haven, and if this group were to retain its ownership and operation of the New York, Ontario & Western, to permit direct transportation of lake grain from Oswego, N. Y., to Boston.

2. That the New York Central continue to lease and operate the Boston & Albany.

3. (*a*) That the Boston & Maine remain an independent New England unit and that in consideration of New England withdrawing its opposition to the 4-party eastern trunk-line merger plan, the Boston & Maine be provided with satisfactory trackage or running rights on a direct water-level route between Mechanicsville or Rotterdam Junction and Buffalo, thereby giving it direct access to the great Middle Western industrial centers via the Nickel Plate and Grand Trunk.

(*b*) That the above be accomplished in such a manner that the Canadian differential routes are still available to the port of Boston over Boston & Maine trackage, and that these differentials be preserved.

Now, the importance, the significance, of that is that while he first said that the Pennsylvania must be kicked bodily out of New England, his proposition here is that the New York, New Haven & Hartford be handed over to the Pennsylvania, body and soul.

Mr. MAPES. What is his reason for his change of attitude?

Mr. HEISERMAN. I beg your pardon.

Mr. MAPES. What is his reason for his change in attitude?

Mr. HEISERMAN. I do not know, except that he went to see the wrong man; he went to see a man that did not know any more about the machinery or the handling of the consolidation matter than you do, Mr. Mapes. Mr. Ogden is a reputable man and is our representative in New England, but he is not empowered to negotiate with anybody for help in any way in connection with the consolidation plans.

Mr. MAPES. That would not be any reason for a complete change of position on the part of Mr. Wilder, would it?

Mr. HEISERMAN. I think I better not refer further to the whole subject. Nothing special came out of that conference, at any rate, and Mr. Wilder appears down here to say that the Pennsylvania should be kicked out of New England.

Now, as I say, the matter of his testimony is trifling. I think that the testimony is an insult to this committee, and unless you give it the contempt which it deserves I am greatly mistaken.

Mr. MAPES. Do you think that Mr. Wilder represented any interest that he did not reveal to the committee?

Mr. HEISERMAN. I do not know. He said he did not represent any interest.

Mr. MAPES. Do you have any reason to doubt that statement?

Mr. HEISERMAN. I do not believe that is a question I am called on to answer, Mr. Chairman. I mean I do not want any speculation in what I say to-day. I shall try to give what I believe to be exact facts, and I do not want to indulge in any speculation, Mr. Mapes. There has been too much speculation. There has been too much conjecture. This is only a part of the propaganda which has been instituted including which has occurred in the Congress of the United States as evidenced by the bills recently introduced, to wit, and the King resolution.

Mr. MAPES. I am not trying to ask any question to embarrass you.

Mr. HEISERMAN. Well, I can not answer.

Mr. MAPES. I am not trying to ask any questions that will embarrass you, but it seems rather unusual to have a man who appeared as he, a responsible man, come down here and make statements which three of you say are absolutely false, and then have you show that he changes his position in regard to the subject matter. I want to inquire as to why there should be such a change in his position.

Mr. HEISERMAN. I can say this, this letter indicates Mr. Wilder—of course, Mr. Wilder is supporting Mayor Curley's proposition. I will not say what the people of New England want. They are divided in different camps. But, at any rate, I know that the governors' committee which is opposed to the Curley plan, Mr. Nelson would be more familiar with this than I am; he knows there is a great body of people in New England that would not be in favor of that sort of thing, and those are some of the reasons why the New England situation was not covered or in any way affected by the 4-party consolidation plan.

Mr. COOPER. Mr. Chairman, I was not here when Mr. Wilder appeared before the committee. I believe I was sick. There has been a letter read here this morning that shows conclusively that he had changed his position. Why not call Mr. Wilder? I think it is hardly fair to ask the witness questions as to why he has changed his mind.

Mr. NELSON. May I ask a question?

Mr. COOPER. Yes.

Mr. NELSON. What is the date of that letter?

Mr. HEISERMAN. I beg your pardon.

Mr. NELSON. What is the date of that letter?

Mr. HEISERMAN. The date of that letter is the 17th of December.

Mr. NELSON. Last December.

Mr. HEISERMAN. Yes, sir.

Mr. NELSON. What was the date of Mr. Wilder's conversation with Mr. Ogden, or whoever it was, in which he said he had no interest in New England?

Mr. HEISERMAN. December 29.

Mr. NELSON. After he wrote the letter.

Mr. HEISERMAN. Yes.

Mr. COOPER. Might that not account for Mr. Wilder's change in attitude?

Mr. HEISERMAN. I do not know what accounts for it. I can not say.

Mr. NELSON. The fact is, is it not, that after he wrote this letter he talked with a man who stated that the Pennsylvania had no interest in New England. Afterwards, and later, three months later, he

comes here and says his opinion now is contrary to that expressed in the letter.

Mr. HEISERMAN. He did not tell what his opinion was on December 17.

Mr. NELSON. No.

Mr. HEISERMAN. But, I want to say this; Mr. Wilder did not appear before the Interstate Commerce Commission in this hearing, but his colleague, Mr. Fay, did, and Mr. Fay's testimony was given in favor of the plan.

Mr. NELSON. Will you tell me what the statements made by Mr. Wilder were that were incorrect? I did not get them the other day.

Mr. HEISERMAN. The ones I specifically say are incorrect——

Mr. NELSON. Are what?

Mr. HEISERMAN. Are the ones in which he states there are outside agreements that have not been placed on the table in the open before the Interstate Commerce Commission.

Mr. NELSON. Well, he says there, as I remember your quotation, to the best of his knowledge and belief, that there were such statements.

Mr. HEISERMAN. He says, his testimony——

Mr. NELSON. How is that?

Mr. HEISERMAN. I say, his testimony is what it is, Mr. Nelson.

Mr. NELSON. You interpret it altogether different from what I do.

Mr. HEISERMAN. Very well.

Mr. NELSON. What else did he say that was incorrect? I have no interest in him. I do not know him. But, if he is a liar, it interests me. What else did he say?

Mr. HEISERMAN. I beg your pardon.

Mr. NELSON. What else did he say?

Mr. HEISERMAN. Well, he said, I think, that is all I refer to in my first quotation, that he said——

Mr. NELSON. Well, will you read that again, what he said.

Mr. HEISERMAN. Yes, sir.

Mr. SHALLENBERGER. Mr. Nelson, I think also he said that there were certain certificates where some one man controlled the whole thing. You deny that, too? He said Mr. Atterbury had a certificate that controlled.

Mr. NELSON. I think when you find what was said about that stock being voted, you will not find there is anything wrong.

Mr. SHALLENBERGER. I think he said, Mr. Wilder said——

Mr. HEISERMAN. Mr. Wilder said, I think, also, gentlemen, that there was a private agreement between the 4-party carriers and that that should also be made a part of the record.

Mr. NELSON. Read the rest of it. You read some of it a few minutes ago.

Mr. HEISERMAN (reading):

> We, as individuals, as private individuals, have no means whatsoever of getting those things.

And then, you make some inquiry as to what he means. You [Mr. Nelson] say:

> What do you mean, that we should get copies of those?
> Mr. WILDER. Yes, sir.
> Mr. HUDDLESTON. May I ask whether they are in the files of the Interstate Commerce Commission?

> Mr. WILDER. They are not.
> Mr. NELSON. Has the commission called for them?
> Mr. WILDER. Not that I know of, and I doubt whether it has the power to. That is what I mean, sir, by "teeth" in this bill.
> Mr. HUDDLESTON. Is that not just what they are seeking to have approved, their private agreement?
> Mr. WILDER. I am not at all sure of that, sir. Their private agreements may go very much further than the application they have made for consolidation.

All I can say to this committee is that there is no proof of an agreement.

Mr. NELSON. I understood that there was one question and answer there, and the question was, do they exist. I think Mr. Huddleston asked that.

Mr. HEISERMAN. Mr. Wilder says:

> To the best of my knowledge, there are private agreements.

Mr. NELSON. That is all he said, to the best of his knowledge.

Mr. HEISERMAN. He does not say, "I have seen them" prior to that. He had said that there were private agreements.

Mr. NELSON. I do not remember that.

Mr. HEISERMAN. Well, all I am trying to do, Mr. Nelson, is to get in the record the fact that I, who know the situation, say that the only agreement that has been made directly or indirectly bearing on the question of consolidation is the agreement on file in the applications of these four railroads before the Interstate Commerce Commission.

Mr. NELSON. Well, to get back, did he not testify, when he was asked definitely as to his exact knowledge, that it was according to the best of his knowledge and belief.

Mr. HEISERMAN. Very well, sir.

Mr. NELSON. That is the statement he made.

Mr. HEISERMAN. But, Mr. Crosser goes a little further and says:

> Have you any information that you think justifies you in saying that?

He wanted to run the thing down probably as would you.

> Mr. WILDER. I believe I have, sir, though I have not seen them.
> Mr. CROSSER. I know you say that you have not seen them.
> Mr. WILDER. I believe I have.

He believes he has seen them.

> The CHAIRMAN. Judge Garber, you wanted to ask a question.
> Mr. GARBER. Yes.

Then, Wilder says:

> For example, there was a trade by which the Chesapeake & Ohio gained access to the Manhattan Island by trackage over the Pennsylvania from Newark to the Pennsylvania Station, by the Lehigh Valley, and, while I can not actually testify to it, I know that they are using the ocean freight terminals in Jersey City.

Now, the application shows that a part of the agreement is if this 4-party plan is carried through, if permitted to be consummated by the acquirement of the various lines, that the Chesapeake & Ohio will get into the Pennsylvania Station just as the Lehigh Valley does, because the Lehigh Valley now gets into the Pennsylvania Station; and as to the ocean-freight terminals, why, the Erie Railroad has magnificient terminals in Jersey City, which the Chesapeake & Ohio may use.

May I proceed?

Mr. NELSON. That is all.

Mr. HEISERMAN. Now, gentlemen, when I came here I expected to present a statement in writing, and had partially prepared one, but after hearing what has gone on, and after hearing Mr. Fitzpatrick's statement with which I was familiar, of course, I concluded that I would not burden the committee with a written statement, and would content myself with saying that I agree absolutely with the statement made by Mr. Fitzpatrick, especially his written statement, in which he tells of his opposition to this particular bill, and, therefore, I shall in a somewhat desultory manner confine myself to a discussion of the law as it now stands, and related to this particular bill. In the first place, I want to say that many things that were said by Mr. Potter, I do not agree with. He was frank enough to say that he did not represent the holding companies, and that he would say many things that would not be agreed to by the holding companies.

The CHAIRMAN. Let me ask you, Judge Heiserman, does Mr. Potter represent any holding companies, as a lawyer?

Mr. HEISERMAN. I beg your pardon.

The CHAIRMAN. Does he represent any holding companies, as a lawyer?

Mr. HEISERMAN. I do not know. He does not represent the Pennroad Co.

The CHAIRMAN. Does he represent the Ryan estate, or don't you know?

Mr. HEISERMAN. I do not know.

Is that all?

The CHAIRMAN. Yes.

Mr. HEISERMAN. As he said, Mr. Fitzpatrick and I had discussed with him some features of the law because of his apparent knowledge of what the law was, by reason of the experience with the commission, and I feel very sure, Mr. Chairman, if Mr. Potter had made a full and complete statement of his views of the law, that it would have been logical and well sustained, although as I say, I do not altogether agree with Mr. Potter.

The CHAIRMAN. You agree with his statement that he thinks all consolidation provisions of the interstate commerce act ought to be repealed?

Mr. HEISERMAN. I frankly say that I think a great deal of the ills of the railroads and the troubles of the commission are due to the consolidation act as it stands to-day, and I will tell you why as I go along.

Now, section 5 of the interstate commerce act is the one, of course, which deals with consolidations.

The CHAIRMAN. Let me ask you this, before you proceed further: Had you rather have the consolidation provisions in the act as they are now, all of them, or none?

Mr. HEISERMAN. I would rather have the Interstate Commerce Commission vested with full power and jurisdiction to approve or disapprove consolidations rather than have the railroads proceed under States laws as they now must do.

I would like to pursue that just a little further, if I might.

The CHAIRMAN. That is not just exactly what I asked you. Had you rather the consolidation provisions of the Interstate Commerce Act were wiped out or left as they are? As between the two, presuming they will not be changed, either be repealed entirely, or left as they are.

Mr. HEISERMAN. Just make it wholly a State matter?

The CHAIRMAN. Or leave it as it is.

Mr. HEISERMAN. Without giving the Interstate Commerce Commission any jurisdiction?

The CHAIRMAN. In any way.

Mr. HEISERMAN. No, we are opposed to that. I think that the Interstate Commerce Commission ought to have jurisdiction.

Now, pursuing that just a little further, paragraph (4) of the law provides "the commission shall as soon as practical prepare and adopt a plan for the consolidation of the railway properties of the continental United States," and so forth, and then under paragraph (5), when the commission has agreed upon a tentative plan, it shall give public notice, and so forth, and thereafter they shall adopt another plan which, instead of a tentative plan, the commission calls a complete plan of consolidation and which they now have.

Then it says:

(6) It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation under the following conditions:

(*a*) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the commission.

Now then, this, of course, was a radical change in the law with reference to railroads and the consolidation of railroads. As no machinery for consolidation was set up, there was provided a stop-gap, an expedient, as it were, awaiting the time when the complete plan of consolidation was enunciated by the commission, and the enactment of laws to carry the same into effect. Thus paragraph (2) of section 5 was enacted, which says:

Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition.

But the thing to be noted here is that any act which involves the consolidation into a single system for ownership and operation can not be accomplished under this paragraph.

Now, there was no plan—Mr. Nelson has talked about the plan we have here. It may be he refers to the complete plan, but I say you gentlemen, I mean Congress, that Congress gave instructions to the Interstate Commerce Commission to construct a foundation upon which should be built the superstructure of the consolidation of railroads, and then gave them no tools, no materials, no machinery, to use in the buildings of such a structure.

The commission has been powerless. What happened? I agree with Commissioner Eastman, that any acquirement of a railroad which

involves the consolidation of carriers into a single system can not be done under paragraph (2) of section 5, and there is no other provision of the statute under which it can be done, except the one I will refer to just a little later.

Now, that is what started the trouble that Mr. Potter spoke about. The first case that he referred to was the Pittsburgh & West Virginia case. They got in very early and they applied under the section of the statute with reference to the issuance of stock and securities in order that they might buy the Belt Line Railroad.

Now, as Mr. Potter stated, in that case, the commission held that the application should be denied because it was for an object, namely, the purchase by applicants, and the sale by the Belt Railway of the property, and an acquisition of it later, which could not lawfully be acquired without their authority under the provisions of section 5 of the interstate commerce act, and no such authority had been sought, and the application was denied.

Then, the Nickel Plate got into action and, taking a leaf out of the experience and the fate of the Pittsburgh & West Virginia, they came before the commission. But what did they do? They proceeded strictly under the State laws with reference to the consolidation of railroads.

I have forgotten how many railroads, but I think there were involved railroads in four or five State. The various corporations entered into a consolidation agreement as is required by the law. The consolidation agreement was submitted to the stockholders of the constituent companies. That agreement of consolidation was approved by the various State commissions, where the State commissions had jurisdiction. It was then filed in the office of the secretary of state of the various States, and so far as the States were concerned, the consolidation was complete.

But, it could not be fully accomplished until the stock of the new company could be issued, the arrangement being that the stock of the new company should be exchanged for the stock of the constituent companies.

They had to apply to the Interstate Commerce Commission for authority for the issuance of stock.

But, what did they do? They did not apply under paragraph (2) of section 5. I agree with Mr. Eastman as to paragraph (2) of section 5 so far as consolidation is concerned, and Mr. Potter was mistaken when he said the Pittsburgh & West Virginia applied under paragraph (2) of section 5.

It was another section of the law. Paragraph (18) of section 1, which provides that no carrier shall undertake extensions or constructions or shall acquire or operate any line of railroad or engage in the transportation under the act without getting from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation.

The Nickel Plate then came to the commission with an application under paragraph (18) of section 1. They never applied under paragraph (2) of section 5. The Nickel Plate case is found in 79 I. C. C. 581, and it is entitled "In the matter of the application of the New York, Chicago & St. Louis Railroad Co. for a certificate of public convenience and necessity authorizing acquisition and operation of certain lines of railroad and for authority to issue capital stock."

And the order of the commission is as follows, as found in 79 I. C. C. 589:

Order: It is hereby certified that the present and future public convenience and necessity require and will require the acquisition and operation by the New York, Chicago & St. Louis Railroad Co., a consolidated corporation, of the States of New York, Pennsylvania, Ohio, Indiana, and Illinois, of the lines of railroads described in said application and report.

And then they granted the authority to issue stock.

Mr. NELSON. Mr. Chairman, may I ask the witness a question?

The CHAIRMAN. Mr. Nelson.

Mr. NELSON. Mr. Heiserman, you refer to my having referred to a plan. I referred to no definite plan, rather to a hypothetical one, and I would like to ask you the same question I have asked other witnesses, if you do not mind.

Do you think, under the commerce clause, that if Congress believes it is in the public interest, a definite plan for consolidation of railroad properties comes within their authority under the commerce clause; have we authority, if we believe it is in the public interest, to determine upon a definite plan of consolidation?

Mr. HEISERMAN. Oh, absolutely.

Mr. NELSON. And we have a right to determine on a particular plan which we believe is in the public interest.

Mr. HEISERMAN. And, your agency, the Interstate Commerce Commission has.

Mr. NELSON. And, if that is a proper subject of our jurisdiction, we have plenary authority in that matter to see that it is carried out.

Mr. HEISERMAN. You have.

Mr. NELSON. But, assuming then, we have the authority, and assuming that we have adopted a definite plan, the protection of which is in the public interest, do you believe that through holding companies, or any other devious device, any person or any corporation, should be allowed to interfere with that consolidation as proposed by the Congress?

Mr. HEISERMAN. No holding company, or any other devious device would have a right to do such a thing.

Mr. NELSON. Do you not feel—I will take a definite case; do you not feel that the Pennsylvania Railroad in controlling the Pennroad Corporation——

Mr. HEISERMAN (interposing). Now, wait a moment. The Pennsylvania Railroad does not control the Pennroad Corporation. That is what I objected to and what I am objecting to, gentlemen.

Mr. NELSON. Well, it is true that a majority of the directors of the Pennroad Corporation are also directors in the Pennsylvania Railroad Co.

Mr. HEISERMAN. It is, sir; it is, sir.

Mr. NELSON. And the Pennroad Corporation has a considerable, a controlling interest in the Boston & Maine, and the New Haven.

Mr. HEISERMAN. The what?

Mr. NELSON. In the New Haven and the Boston & Maine.

Mr. HEISERMAN. What company?

Mr. NELSON. The Pennroad.

Mr. HEISERMAN. The Pennroad?

Mr. NELSON. And the majority of the directors are directors of the Pennsylvania.

Mr. HEISERMAN. The Pennroad?

Mr. NELSON. Yes.

Mr. HEISERMAN. The Pennroad Corporation owns 7.27 per cent of the stock of the New Haven. It owns 19.25 per cent of the voting power of the Boston & Maine.

The Pennsylvania Railroad Co. owns not one single share of the Boston & Maine.

Mr. NELSON. All right. You do not think that it would be proper for the Pennroad or for the Pennsylvania, through the Pennroad, another agency, to control the Boston & Maine, and the New Haven?

Mr. HEISERMAN. Would it be proper?

Mr. NELSON. You think it would be?

Mr. HEISERMAN. It would not be proper, unless in accordance with law, and I say to you, the Pennsylvania Railroad does not now, and the Pennroad Corporation does not control any of those companies. If they did——

Mr. NELSON (interposing). That is what I wanted to find out.

Mr. HEISERMAN. If they do, and there is a violation of law, they are amendable to the present laws.

Mr. NELSON. But, let the antitrust laws go, and consider this proposition, assuming that we have adopted a plan, and have plenary power to carry it out.

Do you think that any railroad through a combination of a holding company, or through any other combination, ought to be able to control the destinies of some road, the acquisition of which, or the control of which, is forbidden under the plan?

Mr. HEISERMAN. I do not, sir; I do not, sir.

Mr. NELSON. That is all.

Mr. HEISERMAN. I do not, sir.

Well, there may come a time when we can get that fair and square issue presented and not be convicted and sentenced out of the mouths of men who appear as do Wilder and Silverman, and men of that class.

Mr. NELSON. And you do not question Congress's authority to make laws that accomplish that?

Mr. HEISERMAN. I would not question the power of Congress, Mr. Nelson, to enact full and complete consolidation laws, and that is what I am saying to you gentlemen.

You have left the Interstate Commerce Commission out on a limb, as it were.

Mr. NELSON. You do not think that there is any question but what we may frame a statute to do what we think is necessary, and that we have the power to prevent its circumvention, if we find that is true, even though it is being accomplished through holding companies——

Mr. HEISERMAN (interposing). Well, do not get holding companies and common carriers mixed up.

Mr. NELSON. They have got mixed up themselves, some people say.

Mr. HEISERMAN. I beg your pardon.

Mr. NELSON. It has been asserted that the matter has already been mixed up. I am not mixing it up.

Mr. HEISERMAN. The assertion has been made?

Mr. NELSON. Yes, that is what I say.

Mr. HEISERMAN. Give us an opportunity to meet it squarely.

Mr. NELSON. That is what you are here for.

Mr. HEISERMAN. And before a committee of this character.

Mr. NELSON. That is what I was trying to develop. That is what I want to find out.

Mr. HEISERMAN. Thank you.

Now then, I will not dwell upon these cases, except to say this, that the railroads were compelled in order to effect any consolidations whatever, to resort to paragraph (18) of section 1, and before they did that, before they came to the commission, they complied strictly with all of the State laws in every respect.

Why, gentlemen, railroads can not be consolidated without the action of the stockholders. The stockholders still own these railroads. They are State corporations and regulated by State laws, and a consolidation can not be effected in a State under the law without a notice to every stockholder, and there are 248,000, I believe, stockholders of the Pennsylvania Railroad Co., of a time and place of a meeting for the consideration of consolidation.

Consolidation has to be approved in some States by two-thirds of the stockholders; in some States by a majority of the stockholders, and after that is done, then the consolidation agreement is filed in the office of the secretary of state, and under ordinary conditions, under State laws, the consolidation is effected; but as I say, they have to come to the Interstate Commerce Commission to issue the stock, and get authority to acquire and operate. In the Interstate Commerce Commission, Mr. Eastman has been right about this, Mr. Eastman says that there can not be any consolidations, because there are no laws governing the same.

Now, paragraph (2) of section 5, as I say, was a sort of a stop-gap, and in order for one carrier to gain control of another by the purchase of stock, or by lease, or otherwise, not involving consolidation, railroad companies have gone before the commission and gotten authority so to do. Strictly speaking, there can not be any consolidations under the Federal act in the common acceptance of the word.

Consolidations and mergers are frequently used in the statutes as synonymous. They are. But, under this act, consolidation means the merging of two or more corporations under the name of one of the corporations or the adoption of a new name; and it means the wiping out entirely of one or more of the corporations. That is consolidation. We are confronted with that proposition. We can not have any consolidations except under State laws.

One of the first things the Pennsylvania Railroad Co. did under the new law was to file applications with the Interstate Commerce Commission asking it to approve the leasing of a dozen or more railroads to the Pennsylvania Railroad Co. under paragraph (2).

Now, Mr. Eastman dissented in those cases, always contending that a lease for 999 years was equivalent to consolidation. We tried to make the distinction, and I believe successfully, that time does not make much difference in leases, as a 999 year lease can be destroyed

or forfeited by failure to comply with conditions, just as much as one for 20 years, or 30 years, as the case may be; but the railroads were confronted with the fact that they could not get approval of the commission unless the necessary proceedings has been taken under the State laws.

That is why I say, you have not given the commission any tools. You have not given it any machinery; there can not be any consolidations under this law as it stands to-day.

Now, we have gotten along very nicely. We do not have any trouble with the State commissions when we do have to go to them, but—and this commission realizes the difficulty has arisen out of the incompleteness of the law. The commission has come year after year, before the Congress, and asked repeatedly that this grouping proposition——

Mr. CROSSER. Repeal of what?

Mr. HEISERMAN. To repeal this law that requires them to set up groups, various groups. They have come before you as I say, year after year, and asked you to do that, because they realize the difficulties in the way.

Now, let me say this, gentlemen, not in the spirit of fulsome flattery, or anything of that kind, but I have been very much struck by the zeal and the interest and the patience and the courtesy which characterizes hearings before this committee, and I say to you, that this committee could do nothing more to help the railroads and the public interests, than to solve this consolidation problem. Either amend the act so that a national consolidation plan can be set up, if it be a legal one, so as to deprive the States of jurisdiction, or else take away everything and leave the States with their jurisdiction as to consolidations, with a provision that no consolidations shall take effect until the Interstate Commerce Commission says so.

Mr. HOCH. Under what paragraph was the 4-party application made; was it made under paragraph (6) of section 5?

Mr. HEISERMAN. Yes; the law is that if after such hearings the commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled—no, that is not right.

Mr. HOCH. Paragraph (6); is it not paragraph (6) of section 5, which provides for consolidation of properties under common ownership and management?

Mr. HEISERMAN. No; paragraph (5) provides when the commission has agreed upon a tentative plan, it shall give the same due publicity. It then says the commission is authorized to prescribe procedure for hearings; and after the hearings the commission shall adopt a plan for such consolidation and publish the same.

Mr. HOCH. That is the plan, but now, I am talking about the application, paragraph (6) provides for applications after the plan has been promulgated.

Mr. HEISERMAN. Yes; but what kind of application could be filed, what kind of a consolidation agreement? With whom would it be filed? What terms and conditions? What consent of stockholders? You have not given them any machinery; you have not given them any statutory rule.

Mr. HOCH. That is the question I am getting at. As I understand your position it is that paragraph (5) and paragraph (6) contemplate

the consolidation of carriers for common ownership and management, into one corporation, but that the law provides no machinery for carrying it into effect after the commission enters an order permitting it. Is that it?

Mr. HEISERMAN. That is exactly it.

Mr. HOCH. You say, why go ahead with the plan if there is no way of carrying it into effect after it is made?

Mr. HEISERMAN. They do not make applications. Nobody has made applications for consolidation to the commission under paragraph (18) of section 1, which is for approval of acquisition.

Mr. HOCH. The 4-party plan then is not an application for consolidation, but an application for modification of the plan.

Mr. HEISERMAN (interposing). And, let me make it clear right now——

Mr. HOCH (continuing). And nobody has in fact applied under paragraph (6).

Mr. HEISERMAN. No; and nobody can, unless, as I say, they proceed under the State laws.

Now, paragraph (5) is the one which says that the commission——

Mr. HOCH. May we just pursue that a little further.

Mr. HEISERMAN. Yes.

Mr. HOCH. From a practical standpoint, why should those interested in the 4-road plan be so deeply concerned about getting a modification of the plan, if there is nothing in the law to carry it into effect after they get it modified?

Mr. HEISERMAN. I will answer that question. Now, when the complete plan has been announced, as it has been, the commission shall adopt a plan for such consolidation and publish the same, but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

Now, what happened? That complete plan was published in 1929 and the railroads were throttled because they could not effect any consolidations of any kind; they could not lease; they could not acquire control of stock, unless it was in accordance with the plan. The plan contemplated, so far as the East is concerned, five systems, as you know. One was the Wabash-Seaboard system, and Mr. Williams, who was the father putative of a fifth system, tried his best to effect financial arrangements whereby that fifth system could be set up, and he could not do it.

Mr. HOCH. May I get that clear. Your contention is that after the plan has been promulgated, under paragraph (4)——

Mr. HEISERMAN. Paragraph (5).

Mr. HOCH. Paragraphs (4) and (5)?

Mr. HEISERMAN. Yes.

Mr. HOCH. That thereafter it is not possible to proceed under paragraph (2) for lease or stock ownership, unless such lease or ownership is in harmony with the plan under (4) and (5)

Mr. HEISERMAN. That is right. Now, as I say, as to the five systems, it was demonstrated that it could not be put into effect, at least that is what the carriers found. The commission itself was nonplussed. If you have read the decision of the commission in announcing the complete plan, you know that they are as far apart as to some of these things as are the poles, but failing to get relief from Congress,

they had to do something, and they gave us the plan. They did not consider any final arrangements in connection with the enunciation of the plan, and the commission itself informally took up with the railroad carriers in the East the proposition of seeing if something could not be done to carry out the mandate of Congress and make real progressive consolidation.

Mr. HOCH. Mr. Heiserman, to me this seems a very important matter in connection with consolidation law. Paragraph (6) says that it shall be lawful for two or more carriers by railroad subject to this act to consolidate their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation under the following conditions, and so forth.

Now, wherein is there any prohibition after the promulgation of the plan against leasing or stock ownership under paragraph (2), which does not contemplate the consolidation of property into one common ownership or management? Where is that?

Mr. HEISERMAN. There is not any.

Mr. HOCH. I understood you to say that after the plan had been promulgated under paragraph (4) that thereafter paragraph (2) of section 5 becomes inoperative unless the lease or control or stock ownership proposed under it is in harmony with the plan. Where is that provision in the law?

Mr. HEISERMAN. Right in connection with the plan of the commission, what it wants to do——

Mr. HOCH. Then you are simply saying, as a practical matter, that the commission will not do it.

I understood you to say in answer to my question that paragraph (2) of section 5 could not apply after the plan had been promulgated unless the application for lease or control was in harmony with the plan.

Now, the law does not say that; at least, I do not see it.

Mr. HEISERMAN. My answer to that is, if you have a complete plan of consolidation, with proper machinery, unless there is some provision made to take care of the situation created by paragraph (2) of section 5, why, it can not be done. That is my point exactly, Mr. Hoch.

Mr. HOCH. Just a moment there. There is just as much machinery left after paragraph (4), after a plan has been promulgated, as there was before.

Mr. HEISERMAN. It depends upon the kind of machinery Congress gives the Interstate Commerce Commission and the carriers.

Mr. HOCH. I am not now talking about the machinery that may be necessary to operate the plan, because this committee reported out a consolidation bill and one of the major purposes was to provide corporate machinery for making effective the general plan proposed.

Mr. HEISERMAN. That is right.

Mr. HOCH. But, it has not been made clear to me at all, the interpretation of this law, the position you have taken here, that paragraph (2) really ceases to have any force at all after paragraph (4) and paragraph (5) become operative.

Mr. HEISERMAN. If you had complete machinery you would not have paragraph (2) of section 5. Just let me illustrate that for a minute and let me tell you what the practical situation is at the present time. Under paragraph (5) under which the commission announced its complete plan, the commission said, in announcing that complete plan, that they reserved the right to change or modify the plan. These four carriers had been working for four years, endeavoring to see whether something could not be done in the way of consolidations and finally they agreed upon a plan, a 4-party plan, instead of a 5-party plan for the eastern district.

Then they made an application to the commission for the approval of that plan, and asked the commission to set aside their own allocation into five systems, and to create a 4-system plan.

Now, if the commission approves that—and mind you, that is just a geographic allocation—nobody is going to be bound by it at all. The same situation will exist then as exists now, except there will be five systems instead of four. Under the systems, as they exist now according to the complete plan, nobody has made much progress along the line of unification; if the 4-party plan is approved, then, unless the law is changed to provide for a consolidation, under Federal law, these carriers, if they want to consolidate, will have to consolidate under State laws, and apply to the commission under paragraph (18) of section 1, to approve the acquisitions and operations, or they will have to pursue the course of asking the commission under paragraph (2) of section 5 to approve the acquirement of control by purchase of stock or by lease.

Mr. NELSON. May I ask you one more question: What section did you say that the 4-party provision was brought under?

Mr. HEISERMAN. By virtue of the provisions of the law in paragraph (5), Mr. Nelson, that after the hearings, the commission shall adopt the plan, and publish the same.

After they have adopted the plan, it says that the commission may at any time thereafter, on its own motion, or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

Now, then, in the commission's complete plan, they expressly refer to that provision, and say it may be modified or changed.

Mr. NELSON. What does section 4 have to do with it?

Mr. HEISERMAN. Section 4.

Mr. NELSON. Yes.

Mr. HEISERMAN. Well——

Mr. NELSON. Paragraph (4).

Mr. HEISERMAN. That says that the commission shall, as soon as practical prepare and adopt a plan for the consolidation of railway property into such systems. "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible"—that is the yardstick under which the commission must act in setting up their system.

Mr. NELSON. And, under these two sections that movement was made.

Mr. HEISERMAN. Right.

Mr. NELSON. That is all.

Mr. HEISERMAN. Now, I am and have been spending a good deal of time, but I know that was Pennsylvania, Ohio and Detroit and other consolidation cases, all of the acquisitions that have been made have been under paragraph (18) of 1 and not under paragraph (6) of section 5.

Mr. HUDDLESTON. May I ask you a question, before you proceed.

Mr. HEISERMAN. Yes.

Mr. HUDDLESTON. As I understand your complaint of the inadequacy of the so-called consolidation feature of the law——

Mr. HEISERMAN (interposing). It is not a complaint. I am just calling your attention to it.

Mr. HUDDLESTON. Criticism, then.

Mr. HEISERMAN. I think that it is embarrassing us.

Mr. HUDDLESTON. Is in the interpretation that it gives the commission nothing more than merely power to approve consolidations and no power to effectuate consolidations.

Mr. HEISERMAN. This present law?

Mr. HUDDLESTON. Yes.

Mr. HEISERMAN. I do not think in terms, there is any power given to the commission to approve. They can only do it by reason of paragraph (18) of section 1, which says they may approve the acquisitions.

Mr. HUDDLESTON. Now, your criticism is that they have no power, having approved it, to put it into effect through legal machinery?

Mr. HEISERMAN. That is right. That is, there can not be a Federal consolidation.

Mr. HUDDLESTON. Your idea is that there should be some Federal authority to effectuate these consolidations, to control the issue of stock, and various things like that, similar to the granting of a Federal charter.

Mr. HEISERMAN. My position is that there should be legislation by Congress providing all of the machinery of consolidation as is provided in the State law, or else everything should be wiped out and enable us to proceed under State laws subject to approval of the Interstate Commerce Commission under proper legal requirements and until that is done there should be no tinkering with section 5 in any manner, especially such as is contemplated by this bill.

Mr. HUDDLESTON. Is that not just what we are doing now, in proceeding under State laws?

Mr. HEISERMAN. Practically.

Mr. HUDDLESTON. Subject to the approval of the Interstate Commerce Commission.

Mr. HEISERMAN. That is right, only we do not come to the commission and ask them to approve consolidations because they do not have any power to approve consolidations. Do you get my point?

Mr. HUDDLESTON. I think I do. You think that there should be some Federal law to relieve you from having to proceed under the laws of the States.

Mr. HEISERMAN. Either that, or let us proceed—I am perfectly willing to go to the States. We have never had any trouble with the States except, of course, when it comes to the matter of the issuance of stock in certain States where there is legislation about the issuance of stock by carriers. There have been complications where a railroad was incorporated under the laws of two or more States. The commissions might not agree in the matter and became necessary that the Interstate Commerce Commission should be given that exclusive jurisdiction as it now has. We fought that for years. We had a case in Maryland. Tue Maryland commission held that it was unconstitutional, that they could not de deprived of their jurisdiction, but the Supreme Court sustained the law.

Now, the exclusive jurisdiction in the matter of the issue of stocks and bonds is with the Interstate Commerce Commission, where I think it should be.

Mr. HUDDLESTON. When the consolidation bill was under consideration, some objection was made to it on the basis that it was of doubtful constitutionality, and of doubtful policy for the Federal Government——

Mr. HEISERMAN. You mean, the Parker bill?

Mr. HUDDLESTON. Yes; for the Federal Government to take a State creature, such as a corporation, chartered under the laws of the State, and convert it into a Federal authority, to clothe it with Federal powers, and to authorize it to do things which its creator, the State, did not permit it to do, and never contemplated that it should do.

Mr. HEISERMAN. It is a very serious question, Mr. Huddleston; a very serious question.

Mr. HUDDLESTON. We must choose, however, between this method and a system of Federal charters?

Mr. HEISERMAN. I think so. As between the present law and the law laid down in the Parker bill and the so-called Fess bill, and the Federal charter; yes.

Mr. HUDDLESTON. Assuming, as to consolidations, that the States all agreed and the railroads had consolidated: Now, if the Interstate Commerce Commission found that was against the best interests of interstate commerce, do you think that the court would allow that consolidation?

Mr. HEISERMAN. No, sir; I think they would not, if there were proper saving power in the Interstate Commerce Commission.

Now, I have already spent a great deal of time, and I have omitted a good deal I was going to say on that general proposition, but I want to refer particularly now to these so-called holding companies. The wonder to me, gentlemen, is that there are not more representatives of investment or holding companies attending these hearings, or taking some interest in them. It is beyond my comprehension. We are here because we have been singled out, as the outstanding malefactors, perhaps you might say, and we have to be here; that is, Mr. Fitzpatrick's corporations and my corporations. I do not think they understand just what this law is.

But, speaking now of the Pennsylvania Co., I want to say that the Pennsylvania Co. is a corporation the whole of the stock of which is wholly owned by the Pennsylvania Railroad Co. It was incorporated in 1871. For 80 years or more the Pennsylvania Railroad Co. has been engaged in consolidating companies, and this Pennsylvania Co. was the instrumentality which was used, especially in consolidating or acquiring by purchase or otherwise, the Pennsylvania Railroad Co.'s western lines.

When we started out, the Pennsylvania Railroad system was composed of more than 600 constituent companies. By a process of consolidation, and so forth, through all of the years, they have been reduced to 58 companies, and now, there are only 7 operating companies in the whole system. In former times there were three or four railroads between Philadelphia and Harrisburg, and four or five railroads between Pittsburgh and Columbus, and so on over the entire system.

Now then, this Pennsylvania Co. formerly—it was under special charter, organized in 1871—operated the railroads west of Pittsburgh. When the railroads were turned back to their owners by the Government, the Pennsylvania Railroad became the sole operating company east and west of Pittsburgh, with the approval of the Interstate Commerce Commission.

Mr. HUDDLESTON. You distinguish between the Pennsylvania Railroad and the Pennsylvania Co.?

Mr. HEISERMAN. Yes; the Pennsylvania Co. is a corporation that is a subsidiary company to the Pennsylvania Railroad Co.

Now, through all of these years, it has conducted a business of handling millions of dollars, and we treat it as a separate company, even though its stock is owned by the Pennsylvania Railroad. It has a corporate entity, and all of that. For instance, the Pennsylvania Co. owned a good deal of stock of certain of our constituent companies, which the Pennsylvania Railroad wanted to acquire, but we had to come to the Interstate Commerce Commission and get its approval for the purchase by the Pennsylvania Railroad Co. of the stock which was owned by the Pennsylvania Co. Consequently, they are considered separate corporations, but now, it is purely not a holding company. It is an investment company, with millions of dollars' investments, and the thorn in the flesh was its acquirement of the stock of the Lehigh Valley, and the Wabash Railroad Co., which was the subject of a Clayton Act case by the Interstate Commerce Commission against the Pennsylvania Company, and the Pennsylvania Railroad Co. The commission held that the Pennsylvania Co. was simply the agent or alter ego of the Pennsylvania Railroad Co., and therefore there was a violation of the law on the part of both companies.

Now, the minute that you complete——

The CHAIRMAN. You say the commission held that?

Mr. HEISERMAN. Yes.

The CHAIRMAN. Do you mean the court?

Mr. HEISERMAN. The commission held that.

The CHAIRMAN. Did it go to court?

Mr. HEISERMAN. The case is now—our company took the case to the court. We claim, and still claim, that there was no violation of the Clayton Act. You remember there is an exception that the provisions shall not apply to a company that acquires the stock for investment and does not use the same by voting or otherwise to suppress competition.

Now, in the trial of that case there was not one scintilla of evidence to show that there was any suppression of competition, but the commission held, as was their province, that the power to do it, potentially, was just the same as the actual exercise of the power to do an act.

Now, as I say, that case is in the Circuit Court of Appeals, and the Circuit Court of Appeals has refused to hear the case until the commission has decided the four-party plan which is before it now. That is to say, if the commission should decide that the allocations are all right, the Pennsylvania Co. owns, as I have said, the Wabash and the Lehigh Valley stock. Under the proposed plan the Pennsylvania is to acquire the Wabash. The Wabash is now in the hands of a receiver, and the stock in anybody's hands is perfectly innocuous.

It can harm nobody. But, if the 4-party plan should be approved, then the Pennsylvania Railroad Co. would have to acquire in some way with the approval of the commission the stock of the Wabash, and the plan contemplates that the Pennsylvania shall give up its Lehigh Valley stock and that it will be acquired by the Chesapeake & Ohio-Nickel Plate system, but that stock can not be acquired by the Cheaspeake & Ohio-Nickel Plate system without filing an application with the commission and getting its approval, and so with all of these other companies, gentlemen, if this geographic plan is set up, not one of these companies can acquire control, by purchase of stock, or by lease, and of course not by consolidation, without coming to the Interstate Commerce Commission, and the Interstate Commerce Commission must approve the price which the carrier must pay for this stock. So that is true with all of these companies, and it is beyond my comprehension, gentlemen, how anyone can claim that these companies are interfering with consolidation.

Now, the purpose of this bill is apparently because, so the witnesses say, there is fear that the consolidation will be hindered. It can not be hindered. No step can be taken in the way of hindering the consolidations under this 4-party plan, until it is approved, and if it is not approved, not one of these carriers can acquire stock control in any other system than the one in which it is placed without going to the commission.

So, the wonder to me is, what does it all mean, gentlemen.

Not only does this plan, not only does the acquirement of these stocks not hinder consolidation, but it is an effort by these carriers to bring about consolidation in the light of the express will of Congress, and to set at rest as far as possible the uncertainty and the instability which have clouded the railroad horizon.

Suppose a corporation—take the Pennroad Corporation; for instance, it owns a certain amount of Pittsburgh & West Virginia stock. Is it not going to be a great deal easier for some company, wanting to acquire the Pittsburgh & West Virginia in pursuance of the plan of consolidation, to acquire that stock from some one company, rather than from 500 or a thousand stockholders, scattered all over the country? I know what I am talking about, because we have been made the victims of individual stock ownership. In one case I know of, we were held up for years, because one man had some shares of stock for which he demanded a price which was 500 per cent more than it was worth. The New York Central Railroad, as you gentlemen know, was held up in the consolidation or amalgamation of its properties because they were held up by litigation for years by a corporation or an individual.

Now, these companies have paid exorbitant prices, somebody says, for stock, in order to acquire control. Well, gentlemen, I think all of you will understand that situation. Why, I could name you numerous cases in our own experience with other railroad companies where they could well afford to pay what might be called an exorbitant price for the stock of other railroads, when by its acquirement they could save the price of that stock five, six, or ten times over in the economies that could be effected, if the properties were consolidated. Price means nothing under those considerations, but, whether it does or not, no stock can be acquired by a common carrier without the intervention or approval of the Interstate Commerce Commission, and

you can not point to a single act, gentlemen, which would lead you, or anyone else, to the conclusion that the so-called holding companies, these investment companies, have interfered in the least with any consolidations, or any acquirements. We are preparing the field for the fray. If the commission approves the plan of consolidation, steps will be taken to acquire, as the law provides, with the approval of the Interstate Commerce Commission, the stock of these various companies or perhaps leases may be resorted to.

If I have not made myself clear on that particular proposition, I will be glad to answer any questions on the point, but just as true as I am sitting here, gentlemen, not only have these investment companies not hindered consolidation, but they are the very agencies to bring about consolidation, under the spirit and the policy announced by Congress.

Now then, a word as to the Pennroad Corporation. As I told you, that corporation was organized April 24, 1929, and—

Mr. CROSSER. What was the primary purpose of the organization of that company?

Mr. HEISERMAN. I was just about to come to that, and before the commission's complete plan was handed down. The railroads were at cross purposes, no complete plan of consolidation having been made. Some railroads were reaching out, acquiring this railroad and that railroad in contemplation of what the commission might do—foolish, in a way because it might have been known, when the commission's complete plan of consolidation was announced, that there could not be any holding of those stocks unless they were in accordance with the pan, eventually; but that spirit was in the air in those hectic days of 1929. You gentlemen remember them.

This Pennroad Corporation was organized under the laws of Delaware and a trust was established, a trust agreement, the object of which was to preserve the continuity and the management of that corporation. If any other kind of a corporation had been organized—and, I will speak frankly—if any other kind of a corporation had been organized, and its stock sold to the public generally, other interests could have acquired that stock, and the best interests of the corporation and the stockholders would not have been served. So a trust was created, a voting trust; trustees were selected, and the stock was issued to the voting trustees, and the voting trustees then offered for sale the voting-trust certificates. This voting trust was for 10 years, and these voting-trust certificates evidenced the right of the holders thereof, at the end of 10 years, to secure an equivalent amount of the stock of the corporation when the trust was wound up.

Mr. NELSON. Why do you say that the stock was not given to the purchasers in the first place?

Mr. HEISERMAN. I beg your pardon.

Mr. NELSON. Why was the stock not given to the purchasers in the first place, when they paid in their money?

Mr. HEISERMAN. No stock was sold to anyone but the voting trustees and the voting-trust certificates were offered in the first instance, as Doctor Splawn's report shows, to the stockholders of the Pennsylvania Railroad.

Mr. NELSON. Well, it was because it was felt that it would not serve the best interests of the Pennsylvania Railroad to issue the stock at that time?

Mr. HEISERMAN. You may put that construction on it, Mr. Nelson.

Mr. NELSON. I am not hostile. I am trying to get the facts. When you say they felt that other interests might come in and work against you, you mean come in and work against the stockholders of the Pennroad, or the interests of the Pennsylvania?

Mr. HEISERMAN. The interests of the holders of the voting-trust certificates of the Pennroad, who were to a great extent at that time stockholders of the Pennsylvania Railroad Co. Now then, those voting-trust certificates were issued, and there are about 157,000 registered voting-trust certificate holders.

Now, I promised yesterday, I think Mr. Milligan asked for it, a statement would be introduced as to the stock holdings of the Pennroad in which you might be interested. This is the portfolio, so far as the ownership of stock is concerned, of the Pennroad corporation. It states that there were 500 shares of the Baltimore & Ohio Railroad Co. common, 44,304 prior preference 7 per cent cumulative stock of the Boston & Maine.

I will be glad to give you this if you want a list of it.

Mr. NELSON. I will get it out of the record.

Mr. HEISERMAN. I was going to put this in the record.

The Boston & Maine has a curious situation. They have prior preferred stock; first preferred A 5 per cent cumulative; first preferred B 8 per cent cumulative; first preferred C 7 per cent cumulative; first preferred D 10 per cent cumulative; first preferred E 4½ per cent cumulative; and preferred (old) 6 per cent noncumulative. I do not understand, myself, all of that classification of stock, but at any rate the Pennroad Corporation, as I say, owned 19.25 per cent of the voting power of the Boston & Maine.

It owns 1,000 shares of the Chicago & Northwestern Railway Co. common; 2,000 shares of the Delaware & Hudson Co. common; 1,000 shares of the Kansas City Southern Railway Co. common; 10,000 shares of the Lehigh Valley Railroad Co. common; 4,500 Missouri-Kansas-Texas Railroad Co. 7 per cent preferred; 148,800 New York, New Haven & Hartford Railroad Co. common; 1,200 shares New York, New Haven & Hartford Railroad Co. preferred; 402,119 Seaboard Air Line Railway Co. common; 500 Southern Pacific Co. common; 10,000 Southern Railway Co. common; 21,975 Canton Co. of Baltimore (that is a huge real-estate company, which owns a little switching railroad called the Canton Railroad); 245,326 shares of the Detroit, Toledo & Ironton Railroad Co. common; 120,000 shares of the National Freight Co. common, a forwarding company; 223,230 Pittsburgh & West Virginia Railway Co. common; 5,100 Springfield Suburban Railroad Co. common.

Now, gentlemen, with the exception of one or two companies, there is not a single company in that list which could possibly be said to be owned for the purpose of hindering consolidation. It is an investment company, pure and simple, and if these terribly depressed times had not come upon us, the investment of every man in that company would be perfectly safe, and I hope when the clouds roll away, that the same may be said. It is in exactly the same position that nearly every other company and bank in the country is at the present time.

Mr. HUDDLESTON. Mr. Heiserman, have you the facts on the percentage of the ownership of the voting shares of the various companies?

Mr. HEISERMAN. Of all of them?

Mr. HUDDLESTON. Yes.

Mr. HEISERMAN. No; I have given the percentage of the New York, New Haven & Hartford, and the Boston & Maine, the Pittsburgh & West Virginia, I have that here. I put that down just for the companies that could possibly be said to have anything to do with probable consolidation.

The Pittsburgh & West Virginia is not a competing company with any other railroad in the list. It is a competing company of the Pennsylvania Railroad Co., and under the 4-party plan, it is to go to the four parties.

Mr. CROSSER. That brings it up to date; that statement brings Doctor Splawn's report up to date?

Mr. HEISERMAN. Up to December 31, and I feel pretty sure that we have not bought any since that date, and I do not think under present prices that we have sold any, because the company does buy and sell for profit.

There is just one thing that might be of interest, and because when Mr. Wilder, or someone was on the stand, Mr. Crosser asked the question if he had read an article in Scribners that the Morgan interests had acquired the Pennsylvania.

I did not see the article, but I just brought this along in order to say that as of the 29th of February, this year, and this report is filed with the Interstate Commerce Commission, the total outstanding stock of the Pennsylvania Railroad Co. was 13,162,742 shares.

The number of holdings was 248,010. The average holding was 53.7 per cent of the shares of stock.

I have here a list of the 20 largest stockholders of the Pennsylvania Railroad Co., of record, at February 1. The highest man on the list owns 50,000 shares out of more than 13,000,000. The next man owns 42,912, and it runs on down to the lowest man on the list, the twentieth on the list, 17,000. No; the lowest man is an insurance company, which owns 15,200 shares.

Those are the 20 largest stockholdings of the Pennsylvania Railroad Co.

Now, that is only incidental to show you that no banking concern owns, or is it reasonably possible for it to acquire control of, the Pennsylvania Railroad Co.

I thought that I had the number of women stockholders, but I have not, but it is a very large number.

(The statement above referred to is printed in the record as follows:)

The Pennroad Corporation stocks owned December 31, 1931

	Shares
Atlantic Coast Line R. R. Co., common	8,000
Baltimore & Ohio R. R. Co., common	500
Boston & Maine R. R.:	
Prior preference, 7 per cent cumulative	44,304
First preferred A, 5 per cent cumulative	50,547
First preferred B, 8 per cent cumulative	24,979
First preferred C, 7 per cent cumulative	24,337
First preferred D, 10 per cent cumulative	14,668
First preferred E, 4½ per cent cumulative	19
Preferred (old), 6 per cent noncumulative	14,968
Common	27,565
Chicago & North Western Ry. Co., common	1,000
Delaware & Hudson Co., common	2,000
Kansas City Southern Ry. Co., common	1,000

	Shares
Lehigh Valley R. R. Co., common	10,000
Missouri-Kansas-Texas R. R. Co., 7 per cent preferred	4,500
New York, New Haven & Hartford R. R. Co., common	148,800
New York, New Haven & Hartford R. R. Co., preferred	1,200
Seaboard Air Line Ry. Co., common	402,119
Southern Pacific Co., common	500
Southern Ry. Co., common	10,000
Canton Co. of Baltimore (over 99 per cent), common	21,975
Detroit, Toledo & Ironton R. R. Co. (over 99 per cent) common Detroit, Toledo & Ironton R. R. Co., preferred scrip	245,326
National Freight Co. (100 per cent), common	120,000
Pittsburgh & West Virginia Ry. Co. (72 per cent), common	223,230
Springfield Suburban R. R. Co. (100 per cent), common	5,100

Now, gentlemen, just a few words more, because my time has almost expired. I want to say to you that there is no excuse or justification or reason for the enactment of this bill, because, as I have said the underlying theory of the bill is that somebody is doing or is going to do something to hinder consolidation; and I think I have, at least I have tried, to demonstrate to you that it is utterly impossible for anybody to interfere or to hinder consolidation, voluntary as it must be.

But, I am coming to the real point of this matter: Some one has said, and I think wisely, that this might more properly be called a bill to regulate the ownership of stock in railroads, and I do not think that you can do it.

The stock of these railroads is privately owned by individual holders and it makes no difference whether these holders are persons or corporations. It is their property. A State, of course, has a perfect right when it creates a corporation—a corporation being the creature of a State, which can not exist without the sanction of the State, to provide that no railroad company, or no corporation even, can own more than, a certain per cent of the stock of a company or corporation, or own any of the stock of a public-service company, without the approval of the public-service commission of the particular State.

A State has a right to do that thing. But Congress has no right, under the law as it now stands, to say anything whatever about the ownership of stock of a railroad or any other kind of a company, unless such ownership is being used to violate some law of Congress, such as the Sherman Anti-Trust Act, or the Clayton Act.

The CHAIRMAN. Judge, it would be very interesting to the committee, and it would help complete your hearing, if you would put in your statement right there, the authorities.

Mr. HEISERMAN. I am going to speak by the book of the law, as laid down by the United States Supreme Court, and I am going back to the case that has been mentioned I think, several times, by Mr. Huddleston, the Northern Securities case (193 U. S. 197). In the first place, you remember that there was a dissenting opinion in that case. I want to refer to it first, to the dissenting opinion in the case by Mr. Justice White, that grand old man, that gallant soldier, who had the honor, exclusive honor, although a Democrat, and a southern Democrat, of being named by a Republican President of the United States as Chief Justice of the Supreme Court.

He was then an associate justice. Justice White, with whom concurred Mr. Chief Justice Fuller—he was no mean lawyer and jurist.

Mr. NELSON. He came from my State.

Mr. HEISERMAN. That was his good fortune.

Mr. Justice Peckham, and Mr. Justice Holmes, dissenting. There, you have Mr. Justice White, Mr. Chief Justice Fuller, Mr. Justice Peckham, and Mr. Justice Holmes, the minority in that case, of course, but what did they say? I quote from Justice White's opinion, page 367:

> In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.
>
> The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." The proposition upon which the case for the Government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.
>
> At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in Gibbons *v.* Ogden, that the power of Congress to regulate commerce among the States and with the foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution"; and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."
>
> The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce—

And so on—

> * * * is thus conceded." But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of Gibbons *v.* Ogden, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passage which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress in acting upon the subject had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in Gibbons *v.* Ogden for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case, and proved so many times since, and hence to test the question for decision by that definition—

And so forth.

Then he said:

> Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in State corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce quoted from Gibbons *v.* Ogden. Let me analyze the definition.

And then he goes on and says, "I think the ownership of stock in a stock corporation can not be said to be in any sense traffic between the States or intercourse between them.

He expressly says, as I have read, that Congress does not have the power to regulate the ownership of stock in corporations.

Now, you may say this is the minority opinion. Let me turn just a moment to Justice Harlan's opinion.

The CHAIRMAN. That was the opinion of the court?

Mr. HEISERMAN. That was the minority opinion of the court. Justice Harlan and his associates were evidently struck by what Justice White had said, which they had doubtless been arguing among themselves, because, in the opinion of the majority, he deals with the subject (pp. 332 et seq.), and I quote briefly from page 334. Says Justice White:

> In this connection it is suggested that the contention of the Government is that the acquisition and ownership of stock in a State railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words and other times by implication. * * * We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of State corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution. It does contend that no State corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in referring free competition between them."

And so forth.

> Independently of any question of the mere ownership of stock or of the organizas tion of a State corporation, can it in reason be said that such a combination ie not embraced by the very terms of the antitrust act? May not Congress declar- that combination to be illegal?

And, that was the proposition, the thesis upon which that case was decided. There was an illegal combination in restraint of trade, the court held.

I say to you, that that case indicates that the entire court was in accord with the proposition that the Congress does not have the power to regulate the ownership of stock in State corporations and if these holding companies use their stock in combination in restraint of trade or in suppressing or limiting competition, there are ample laws to reach them.

The CHAIRMAN. Judge, we are very much obliged to you.

I will state to the committee that the chairman will be absent most of next week, but that the hearings under Mr. Huddleston, acting for the chairman, will go on, and we hope to complete it with but two more witnesses on this bill and then, maybe Tuesday, or Wednesday, at least, Mr. Eastman will come back, and then either Doctor Splawn, or Dean Breckenridge will make some statements on the law in this case before closing the hearings. I mean, Tuesday of next week.

I do not know yet whether the committee will meet Tuesday or go over until Wednesday. We have to arrange with the witnesses to see what their conveniences are.

Do you want some more time, Judge?

Mr. HEISERMAN. No.

The CHAIRMAN. Then, it is the hope of the chairman, with the approval of the committee, to take up the two bills on which we will have completed the hearings, and at that time dispose of them before the committee does any other work.

(Thereupon, at 11.50 o'clock a. m., the committee adjourned, to meet at the call of the chairman.)

REGULATION OF RAILROAD HOLDING COMPANIES

WEDNESDAY, MARCH 23, 1932

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 o'clock a. m., Hon. George Huddleston presiding.

Mr. HUDDLESTON. The committee will come to order.

STATEMENT OF HON. JOSEPH B. EASTMAN, COMMISSIONER, INTERSTATE COMMERCE COMMISSION—Resumed

Mr. HUDDLESTON. We have with us this morning Mr. Eastman, of the Interstate Commerce Commission, who has been recalled to make such comment he may desire on the testimony that has been given in this hearing, and also to say anything further that he may want to say.

Mr. Eastman, will you proceed?

Commissioner EASTMAN. May it please the committee, I have had an opportunity to review rather hurriedly the testimony which has been given at these hearings since the time of my former appearance. There are a good many matters upon which I might comment, but I shall endeavor to confine myself to points of substantial importance, and I shall start with some which I think have no great importance, but perhaps should be cleared up. The first one is, I think, of the least importance of all, and that is the point which was made that this bill is an Eastman bill, or at least embodies an Eastman policy. The idea seems to be that that is sufficient to condemn it. I take it that the issue before you is whether the bill has merit, and not whether it is my bill, or anybody else's bill. However, I want to give you the facts in regard to that matter, and in that connection, to review a little history very briefly.

On January 21, 1926, I appeared before the Senate Committee on Interstate Commerce in regard to Senate bill 1870, which dealt with the consolidation question, and I appeared at that time for a majority of the commission. I recommended a bill, and in connection with that bill, made this comment:

> I may say, also, that our bill is drawn with the intent of covering all possible forms of unification, whether direct or indirect. For example, it specifically covers unifications which are brought about through the medium of a separate stock holding company. At the present time there is doubt whether unifications accomplished in this indirect way are within the purview of section 5. To illustrate this doubt, I refer to our decision in stock of Denver & Rio Grande Western Railroad (70 I. C. C. 102). That was a case where the Denver & Rio Grande Western and the Western Pacific had been unified through the acquisition of the stock of each by a separate holding company. If the language in our bill is not broad enough to include and cover all forms of unification, however brought about and whether by direct or indirect means, it should be changed so that it will accomplish that result. It was drafted with that intent.

Now, that bill, as it happened, had been submitted previously to the Senate committee in a letter dated February 4, 1925, signed by Chairman Aitchison in behalf of a majority of the commission, so that you will see that seven years ago this question was before the commission and that it anticipated what might happen through holding companies. Subsequently, after the holding company operations in eastern territory developed, we went into the matter quite extensively on pages 79 to 83 of our annual report in 1929. That report was the beginning of the proceedings which this committee instituted for the investigation of the general subject. Those recommendations were repeated in 1930 and 1931.

Now, with respect to the bill which is before you, H. R. 9059, since the time of my last appearance that has been submitted to the entire commission and considered in conference together with the statement which I made before this committee, and I am now authorized to say that H. R. 9059 is unanimously approved by the commission.

So far as my statement is concerned, I have no doubt that there may be certain things which I said with which all members of the commission do not fully agree. However, there was no difference of opinion of sufficient importance so that any member of the commission wanted it brought to the attention of the committee. Commissioner Mahaffie did make three suggestions with respect to the bill, which I should like to bring to your attention. He suggested in line 6, page 6, that the word "will" be changed to "may." He also suggested in line——

Mr. MAPES. Will you read the sentence?

Commissioner EASTMAN. The sentence is a long one. I will read the last part of it, in which the word is included.

> It is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such carrier.

He suggests that the word "will" in line 6 be changed to the word "may."

In line 17 of page 7, he suggests that the word "shall" be changed to "may." The sentence is:

> The commission in its order requiring any such divestment, shall provide for a trust agreement for a limited period or for other appropriate measures.

And so on.

He suggests that it be made to read "may provide."

He also suggests that section 4 be omitted, which reads as follows:

> SEC. 4. The provisions of the interstate commerce act, as amended, as in force prior to the enactment of this act, shall remain in force, as though this act had not been enacted, with respect to the acquisition by any carrier, prior to the enactment of this act, of the control of any other carrier or carriers.

Now, I am inclined to agree with him about that section 4. I think it is unnecessary, and that it is subject to possible misconstruction or misinterpretation.

With respect to his other——

Mr. MAPES. What good could it do?

Commissioner EASTMAN. What?

Mr. MAPES. What good could it do?

Commissioner EASTMAN. I do not think it could do any good at all.

With respect to his other changes, I am not urging them, but I have no objection to them. I think they tend to make the bill not quite so strict in its language, perhaps, as it is at present.

Mr. BULWINKLE. Mr. Chairman.

Mr. HUDDLESTON. Mr. Bulwinkle.

Mr. BULWINKLE. Mr. Commissioner, the commissioners are in accord with the retroactive features of the bill in that next to the last paragraph?

Commissioner EASTMAN. They are.

The second point which I wish to take up is the statement of my good friend, former Commissioner Potter, that I am in error in respect to the intent of section 5 of the interstate commerce act. I think, in his comments on that matter, that he failed to distinguish between the general intent or purpose of the section and what the section actually accomplished, as drafted.

Now, at the time of my former appearance, I made this statement upon that point:

> In section 5 of the interstate commerce act, Congress has manifested a clear purpose to place the consolidation or unification of the railway properties of the continental United States into a limited number of systems completely under the control of the commission. Without such a purpose the provision for a consolidation plan would be meaningless. Experience has shown, however, that as it stands, section 5 does not accomplish that result.

I stand by that statement. And, to amplify it somewhat, I want to read a comment which I made at another time.

> Nor can paragraphs 4 and 5—

Those are the paragraphs relating to the consolidation plan—

> Be read without realization of the magnitude and at the same time delicacy of the task imposed upon the commission. Obviously, all the railroad properties of the country can not be grouped into a limited number of systems competing with each other, maintaining existing channels of trade and commerce, well balanced financially, and of similar earning power, without the most painstaking consideration of each property from many different points of view. Obviously, also, many possible consolidations which would in no way be barred by the restraining provisions of the antitrust laws or other Federal or State statutes might be wholly inconsistent with such a plan and destructive of its purpose.
>
> I am wholly unable to believe that Congress intended to impose such a task upon the commission without giving it control over the situation.

I do not believe that the purpose of section 5 was merely to furnish relief in certain cases from the provisions of the antitrust statutes, as was suggested by former Commissioner Potter.

Now, the cases which he cited dealt with the interpretation which the commission has placed upon the section as drafted, and you will find that all of those cases, I think, were discussed by me at the time when I first appeared before this committee in regard to this general subject, beginning April 5, 1930. You will find them in that discussion. I did not think it was necessary to go over that ground again in appearing before the committee at this time.

Now, so far as the——

Mr. HUDDLESTON. Are you departing from that point now, Mr. Commissioner?

Commissioner EASTMAN. No; I was going on.

Mr. HUDDLESTON. Proceed.

Commissioner EASTMAN. So far as the interpretation of section 5, as it was drafted, is concerned, I find myself, I think, in rather complete agreement with Mr. Fitzpatrick. I agree that the section as drafted does not, as it has been interpreted by the commission, regulate the combining of carriers through stock ownership by holding

companies. I agree that it requires commission approval of any acquisition of control of one carrier by another, regardless of the antitrust statutes, regardless, in other words, of whether or not they are involved. In that connection, I cite the Chicago Junction case (264 U. S. 258). I agree, also, that now that the consolidation plan has been adopted, the section requires commission approval of any consolidations of carriers regardless of whether the antitrust statutes are involved, and in that connection I cite Snyder *v.* N. Y., C. & St. L. R. R. Co. (278 U. S. 578), and therewith the case of the same title, in the Ohio Supreme Court, should be read, which is 160 N. E. 615.

Mr. HUDDLESTON. Mr. Eastman, may I interrupt you a moment?

Commissioner EASTMAN. Yes.

Mr. HUDDLESTON. As I understood Mr. Potter's view of the law, it was that prior to the passage of the transportation act of 1920, only such consolidations and mergers could not be made as were prohibited by the antitrust laws.

Commissioner EASTMAN. Or State statutes.

Mr. HUDDLESTON. That the effect of section 5 was merely to lift the prohibitions of the antitrust laws as to certain consolidations which had previously been prohibited, so as to permit them to be made where the approval of the commission could be secured.

As I got it, his view of the law was that the law which now requires the approval of the Interstate Commerce Commission in other cases is that found in paragraph (18) of section 1. He called particular attention to the fact that the procedure for consolidations had been taken before the commission under paragraph (18) of section 1.

Commissioner EASTMAN. Well, I am going into that.

Mr. HUDDLESTON. I wanted to invite you to discuss that view of the law from which, as I understand, you dissent.

Commissioner EASTMAN. Yes.

Mr. HUDDLESTON. You hold that section 5 of itself forbids without the approval of the commission, unifications, in all cases.

Commissioner EASTMAN. Yes; so far as paragraph (2) of section 5 is concerned. I call your attention to the following language of the Supreme Court in the Chicago Junction case (258 U. S. 258, 267):

> It is true that, before transportation act, 1920, the interstate commerce act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And, by reason of a provision then contained in section 3 of the interstate commerce act, the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. (Compare Louisville & Nashville R. R. Co. *v.* United States, 242 U. S. 60; Manufacturers Ry. Co. *v.* United States, 246 U. S. 457, 482.) But transportation act, 1920, repealed that provision in section 3; it made provision for securing joint use of terminals; and it prohibited an acquisition of a railroad by a carrier, unless authorized by the commission.

Now, bear in mind that that was said in a case which involved the acquisition by the New York Central of certain terminal properties. I take it that the antitrust statutes could not have been involved in that, and the Supreme Court in that expression makes no reference to the antitrust statutes. It makes the plain statement that the transportation act "prohibited any acquisition of a railroad by a carrier, unless authorized by the commission."

Mr. HUDDLESTON. May I ask was that a case in which there was any question of expressly coming under the paragraph (2) of section 5?

Commissioner EASTMAN. It was a case in which the commission had granted authority to the New York Central to acquire control of those terminal properties under paragraph (2) of section 5. The direct issue before the court then, as I recall it, was the right of certain railroads to intervene and be heard in that case, but the court made those comments upon the meaning of section 5. And in Justice Sutherland's dissent, to show that he had the same view of the law, he said:

> It is claimed, however, that transportation act, 1920, so alters the rule as to give a right of action to complainants where none existed before. I am unable to perceive any sound basis for the conclusion. That act, so far as this question is concerned, requires the carrier, as a prerequisite to an acquisition of the character here under consideration, to secure the authorization of the commission, which that body may grant if "it will be in the public interest."

That refers to paragraph (2) of section 5. Now, so far as paragraph (6) is concerned and any consolidations made thereunder, in the Nickel Plate case, as former Commissioner Potter called to your attention, the present Nickel Plate system was put together by a consolidation effected under State laws and no approval by the commission under section 5 was secured.

Now, certain minority stockholders, I think, or interests of that kind, went into court with respect to that matter. They went into the Ohio court, in the first instance. That case is found in 160 N. E. 615, and their plea was rejected by the court, which said, among other things:

> Pending the adoption of the complete plan, voluntary consolidations not violative of State or Federal antitrust laws are not expressly prohibited. If, on adoption of a complete plan, it should be found that any consolidation made by voluntary agreement is out of harmony with such plan, the consolidated corporation might find itself in an unfortunate situation, but we are not concerned with that question at this time.

And then at another place the court said:

> In the light of all those cases, we find nothing in the transportation act of 1920 prohibiting consolidations under State statutes, where no antitrust legislation is violated, during the interim of formulation and adoption of the complete plan of unification. It seems more reasonable to hold that Congress has merely surveyed the field without fully occupying it, and that section 5 of the interstate commerce act, as amended, operates as a caveat and a warning, but not as an injunction.

That decision was affirmed by the Supreme Court of the United States in a per curiam opinion, Snyder *v.* New York, Chicago & St. Louis Railroad Co., (278 U. S. 578), and there the Supreme Court said:

> This case is affirmed on the ground that section 407 of the transportation act of 1920 (41 stat. 480, ch. 91), amending section 5 of the interstate commerce act, has not as yet been applicable to cases like this.

That was decided before the promulgation of the plan.

Mr. HUDDLESTON. Then, as I get it, the provision against consolidation is not found in paragraph (2) of section 5, but in paragraph (4) et seq. relating to the plan.

Commissioner EASTMAN. And paragraph (6).

Mr. HUDDLESTON. That is what I mean.

Commissioner EASTMAN. Now, a little later, if you do not mind, I am going to say something about paragraph (18) of section 1.

In this connection, in view of certain of former Commissioner Potter's remarks, I want to say that I have not charged the holding companies with violating section 5, except that my personal opinion is that in the case of the acquisition of the Wabash and Lehigh Valley stocks by the Pennsylvania Railroad through the medium of the Pennsylvania Co., section 5 was violated, as well as the Clayton Act.

I have charged that common control of various carriers has been effected through the Van Sweringen holding companies, and the Pennroad Corporation in such a way that it is difficult to prove the fact of control to the satisfaction of the law, and that this was done intentionally. I stand by that.

I am inclined to believe that certain of the combinations, so brought about, were, and are, in violation of the antitrust statutes. I refer in that connection to the union of the Chesapeake & Ohio, the Erie, and the Nickel Plate in one system, these being to some extent parallel and competing carriers. I refer also to the union of the Pennsylvania Railroad with the Detroit, Toledo & Ironton, and with the Pittsburgh & West Virginia, and if I may be permitted to do so, I should like to include in my remarks, but without reading at this time, a very interesting opinion which was rendered to the New England governors' committee by Mr. Bentley W. Warren, an eminent lawyer of Boston, Mass.

Mr. CROSSER. Representing whom, Mr. Commissioner?

Commissioner EASTMAN. What?

Mr. CROSSER. Whom was he representing?

Commissioner EASTMAN. He was the attorney representing the New England governors' committee.

Mr. CROSSER. I see.

Commissioner EASTMAN. In that opinion, he considered the possible legal consequences of the purchase of the stock of the New England railroads by the Pennsylvania Railroad, or the Pennroad Corporation, and he made a suggestion with respect to the Clayton act which I had not thought of before he made it, and which is very interesting, and that is that that act may prohibit an acquisition where the carriers involved are not parallel and competing but lie end to end, but where the effect of the acquisition is nevertheless to restrain trade. The idea is that the acquired road is restrained from interchanging traffic freely with other connections which are in competition with the acquiring road. It is a very interesting opinion and, if I may, I should like to include it in my remarks.

Mr. HUDDLESTON. If there is no objection, that will be permitted.

(The matter referred to is as follows:)

If it is objectionable from the New England standpoint that a carrier by railroad, owning or operating no railroad within New England, should control, or be in a position to exert a substantial influence upon, the policies and operation of either the New Haven or Boston & Maine companies through stock ownership, there arises the question of whether such stock ownership as that disclosed in your hearings on the part of the Pennsylvania Railroad Co. is in whole or in part unlawful and can be terminated.

At the outset of the inquiry, it may be stated that there appear to be no general statutes of any one of the States, from which either major New England railroad has received charter powers, imposing upon the ownership of this stock restrictions or prohibitions, which would be applicable to the present stockholdings of the Pennsylvania Railroad or of its affiliated Pennroad Corporation. Whether among the many special statutes affecting the two New England railroads, and their numerous merged constitutents, there might be found some such restriction or prohibition I am unable to say without making a more complete examination of many years' legislation than time has permitted. I doubt, however, the existence of such special prohibitive statutes.

One is thus brought, in seeking light on the question of the lawfulness of those stockholdings of the Pennsylvania Railroad and of the Pennroad Corporation, to a consideration of Federal law, which may most conveniently be examined first as to the Pennsylvania's direct holdings, and secondly as to those through the Pennroad Corporation.

First, as to the Pennsylvania Railroad Co.'s direct ownership of New Haven Railroad stock. By the transportation act 1920, section 5 of the interstate commerce act was amended by the addition of various paragraphs. The second paragraph was as follows:

"(2) Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public intrest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises."

Paragraphs 4 to 6 provided for the consolidation or merger of carriers by railroad, and paragraph 8 "relieved from the operation of the 'antitrust laws', "as designated in section 1" of the Clayton Antitrust Act, so called, and from "all other restraints or prohibitions by law, State or Federal," the carriers affected by any order made under the foregoing provisions of this section (which of course included paragraph 2) in so far as might be necessary to enable them to do anything authorized or required by any order made under those provisions.

Two constructions have been suggested of the intention and effect of said paragraph 2 of section 5, both assuming that prior to the transportation act 1920 a carrier by railroad ordinarily and in the absence of charter restrictions had a right to acquire stock in another, or at any rate in another concompetitive, carrier.

One construction, and that advanced by General Atterbury on behalf of the Pennsylvania Railroad, is that this paragraph left unaffected the right of such acquisition, unless the acquisition involved the control by lease, stock ownership, or otherwise, of a competitive carrier, and that in the case of the latter sort of acquisition, the intent and effect of the paragraph was to enable the carrier acquiring such control to be relieved, through the approval of the acquisition by the commission as in the public interest, under paragraph 8 of section 5 of the interstate commerce act, from the operation of the antitrust and other acts therein mentioned or referred to. If this construction is correct, it would follow that the acquisition of control by one carrier of another, in a case where the acquisition would not substantially lessen competition between them or restrain interstate commerce in any section or community or tend to create a monopoly of any line of commerce, and which violated no other applicable restrictive or prohibitive statutes, would be lawful without any approval or authority first being obtained from the Interstate Commerce Commission. This construction would thus make the purpose of this paragraph merely an extension of the previously claimed right of the carrier, so as to include also acquisition of control even of competitive carriers by lease, stock ownership, or otherwise, if it could obtain authorization and the approval thereof by the commission. Otherwise it would have no effect.

The other construction of this paragraph is that whatever may have been the right to a carrier respecting acquisitions prior to the enactment of the transportation act 1920, the Congress in that act took jurisdiction of such acquisitions in all cases and prescribed the method, and, by delegation to the commission, the extent, of making such acquisitions, and that by so doing the Congress in effect and as a matter of law prohibited such acquisitions without the approval and authorization of the commission.

The correct interpretation of this paragraph has not yet been determined by the Supreme Court. It seems to me, however, that the second construction stated above is more consistent with the recognized general purposes of the transportation act and with the special objects in the contemplation of Congress in enacting the amendments to section 5 of the interstate commerce act, and is likely to be the construction finally adopted by the Supreme Court.

Another question, which is of interest, arises under the prohibition, in section 7 of the Clayton Act, of the acquisition by one corporation of the whole or any part of the stock of another corporation, both engaged in interstate commerce, the effect of which may be "to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce." A complete determination of what would constitute such restraint or create such tendency has not been made in the case of carriers.

The kind of carrier competition deemed desirable, as pointed out in your committee's report, as it was also in the Storrow committee's report of 1923, is that among the trunk lines, beginning on outward movements and terminating on inward movements, at the so-called New England gateways. Speaking generally, these gateways are reached in New England movements of freight, either over the New Haven Railroad or over the Boston & Maine Railroad. By the interconnections between these two carriers, a shipper has the choice practically among them all, including by connections with the Boston & Albany Railroad, the gateway at Albany.

Whether this type of competition is within the purview of section 7 of the Clayton Act has not, we believe, ever been considered or a determination reached by the Supreme Court or even by the Interstate Commerce Commission. It must, however, be obvious that if the Pennsylvania Railroad controlled, or were in a position substantially to influence, shipments over the New Haven, its interest and inclination would lead it to route them via Harlem River, or, in the alternative, via Maybrook, at which points transportation of such shipments could be continued southerly or westerly over the Pennsylvania's own rails. More self-denial than may reasonably be expected of railroad traffic managers would be required to lead the Pennsylvania officials to facilitate such shipments over the New Haven connections with the Boston & Albany, or with the Boston & Maine, to reach the trunk line connections at the Albany or Mechanicville gateways or those of the Canadian lines in northern New England. The desire which is reasonably to be anticipated on the part of the Pennsylvania to utilize its control of, or influence over, the New Haven for the benefit of its own traffic would certainly tend to restrain the freedom of interstate commerce by railroad in the territory served by the New Haven Railroad and tend to create in favor of the Pennsylvania Railroad a practical, even though technically not a legal, monopoly of such commerce. If this view is sound, its indorsement by the courts, which seems to me not unlikely to be given, would seem almost necessarily to establish the unlawfulness of the Pennsylvania's acquisitions of New Haven stock, certainly since the enactment of the transportation act 1920, and perhaps also since the enactment of the Clayton Antitrust Act in 1914, unless possibly the earlier acquisitions represented such a small interest in the New Haven voting stock as to be negligible.

If the construction which I consider the correct one to be placed on paragraph 2, section 5, of the interstate commerce act appeals to the governors of the New England States as sound and if they are of opinion that the retention of the control of the New Haven Railroad by the Pennsylvania Railroad Co. to the extent already acquired, or that an extension of that control, would be inimical to the best interests of the New England States, or of any of them, or to the preservation of freedom of interstate commerce for those States, the logical corollary would be the initiation by the governors, or by other proper agencies of the several States, of appropriate proceedings against the Pennsylvania Railroad Co. to bring about a termination of its ownership of New Haven stock, either entirely, or at least to such an extent as would make its ownership negligible so far as enabling it to influence the policies and operation of the New Haven Railroad.

It is suggested further that the governors consider the desirability of each recommending to the legislature of his State the passage of a law to prohibit the acquisition, ownership, or exercise of the voting power of stock of a railroad corporation of such State by any other corporation directly or indirectly owning, operating, or in control of a carrier by railroad not chartered by such State. Such a law should contain provisions to require a disclosure of the real ownership of stock, represented at any stockholders meeting, as a condition precedent to the exercise of the voting power thereof.

Second, as to the possible indirect ownership by the Pennsylvania Railroad of New Haven Railroad stock and of Boston & Maine Railroad stock. The Pennsylvania Railroad Co. has apparently not directly acquired any stock or other form of control of the Boston & Maine Railroad. Has it done so indirectly or, more specifically, through the Pennroad Corporation, and what also is the

effect of the Pennroad Corporation's ownership of New Haven stock, in addition to the stock owned directly by the Pennsylvania Railroad Co. which has already been considered?

The organization and activities of this Delaware corporation are set out in considerable detail in House Report No. 2789, Regulation of Stock Ownership in Railroads, pages 632 to 714, submitted at the recent session of Congress, and are also given in summary form earlier in your present report. That report of the investigation already made by the House Committee on Interstate and Foreign Commerce into the organization of the Pennroad Corporation and the subsequent conduct of its affairs and of the personnel of its officers, furnishes considerable evidence upon which to base proceedings for the termination of its ownership of stock in the New Haven and Boston & Maine railroads. If it should be shown in such proceedings that through the Pennroad Corporation the Pennsylvania Railroad has directly or indirectly acquired, in violation of section 7 of the Clayton Act, the whole or any part of the stock of another corporation engaged also in commerce and that the effect of such acquisition may be substantially to lessen competition or restrain commerce or tend to create a monopoly, the result of those proceedings would probably be to terminate the ownership of the Pennroad Corporation in the stock of the Boston & Maine Railroad and in the stock of the New Haven Railroad. What has been said above with respect to the direct ownership by the Pennsylvania Railroad of New Haven stock with reference to section 5 of the interstate commerce act and to trunk-line competition at the New England gateways would seem to be equally applicable to the Pennsylvania's indirect ownership of stock in both the New England railroads through the Pennroad Corporation. If the Pennroad Corporation is merely a device by means of its ownership of stock in the Boston & Maine and New Haven railroads to enable the Pennsylvania Railroad to secure control of those two railroads, thus amounting to a combination in restraint of trade or commerce among the several States, the Sherman law would also be applicable.

Commissioner EASTMAN. Now, the question came up at the prior hearings, and much time was spent on it, as to whether the Pennsylvania Railroad Co., through these stock acquisitions, controls the New Haven and Boston & Maine Railroads.

I do not want to express any personal opinion on that, nor do I think it is a matter of much importance for present purposes. If they have not acquired control, at least they have gone up to the brink, and it would not take much more acquisition for them to go over the brink, but I do want to call to your attention what was said by the New England governors' committee on that point. That was a committee appointed by the governors of the New England States and composed of very eminent gentlemen. I think that Mr. Nelson, for example, probably knows these men who signed for Maine—Edward E. Chase, chairman, Benjamin F. Cleaves, Walter L. Gray, Edwin M. Hamlin, and Clarence C. Stetson; and Congressman Lonergan probably knows these men from Connecticut—E. Kent Hubbard, chairman, E. Allen Moore, William H. Putnam, George S. Stevenson, and Henry Trumbull.

From New Hampshire there were, among others, two ex-governors, Governor Bass and Governor Spaulding.

Now, they made this statement after investigation:

In view of our conclusion that extension of trunk-line control is not advisable, it becomes necessary to examine the present position of the Pennsylvania Railroad in relation to the New Haven and the Boston & Maine.

In our opinion the present degree of ownership of the Pennsylvania in both of these railroads is excessive and gives the Pennsylvania an opportunity to exercise practical working control at any time it should wish to do so. In reaching this conclusion we are impressed with the fact that the Pennroad Corporation is, in the final analysis, an agency of the Pennsylvania Railroad and for all practical purposes must be so considered.

And at another point they said:

> It has been stated that the Pennsylvania has not interfered with the management of either the New Haven or the Boston & Maine, but it must be remembered that its present ownership gives the Pennsylvania a controlling voice in the policies of both railroads whenever it is for its interest to exercise it. The present policy of moderation may well reflect the enlightenment of General Atterbury, but there is no assurance that those who follow him will be as statesmanlike in their attitude.
>
> We believe that the disadvantages to New England of trunk-line control of the railroads which have already been enumerated apply with force against the present ownership of the New Haven and Boston & Maine by the Pennsylvania Railroad, and that it is in the interests of New England that this ownership should be reduced to a percentage which would effectively prevent the Pennsylvania from exercising a controlling voice in either of these railroads.

I call your attention in that connection to the fact that the Pennroad Corporation alone has spent $32,828,440 in acquiring stock in these New England railroads at prices which, in my opinion, were not justified for investment purposes. Now, why was all that money spent—and that does not take into account other amounts which were spent by the Pennsylvania Railroad direct.

NOTE.—The Pennsylvania Railroad has invested $34,465,118 in New Haven stock.

Mr. HUDDLESTON. The suggestion has been made, Mr. Eastman, that the Pennroad Corporation was an investment company merely, the fact that the stock was offered to Pennsylvania Railroad Co. shareholders first, was a mere coincidence and that all these railroad stocks that it bought were for the purpose of investment and not of control.

Commissioner EASTMAN. I am going to touch on that very matter a little later. That is one of the points which I intend to cover.

Now, Judge Heiserman said that if the commission approves a 4-system plan, "after that is done, then, unless the law is changed to provide for a consolidation under Federal law, the carriers will have to consolidate under the State laws and apply to the commission under paragraph (18) of section 1, to approve the acquisitions and operations, or they will have to pursue the course of asking the commission to approve the consolidations by purchase of stock or by lease."

I do not agree with his view of the law on that point. It seems to me that the situation is exactly the same with respect to both acquisitions of control and consolidations. Corporate authority to consolidate or acquire stock or lease must now come from State charters unless the carrier has a Federal charter; but if such corporate authority exists, it may be exercised with the approval of the commission regardless of any restraints or prohibitions of State laws or of the antitrust statutes.

Now this, I think, is a minimum view of the law. I believe that some railroad lawyers entertain the opinion that section 5 constitutes a grant of corporate authority from the Federal Government to consolidate or acquire control.

Mr. HUDDLESTON. May I call attention in that connection to paragraph (8) of section 5 provides that the carriers consolidating are relieved of the operations of the antitrust laws, and "of all other restraints, or prohibitions by law, State or Federal, as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

Commissioner EASTMAN. Now, the things which have stood in the way of consolidations under paragraph (6) of section 5 have been these:

First, they could not be effected until the consolidation plan was adopted, and that was not adopted until, I think, July, 1929.

Secondly, they have been prevented by the provisions of subparagraph (b) with respect to capitalization, which required the commission to complete its valuations under section 5, and adjust the capitalization of the consolidating corporation with reference to those valuations.

Third, they have been interfered with by the construction, which some lawyers have placed upon the paragraph, that it applies only to technical consolidations, and not to mergers or purchases of property, and only to corporations which theretofore have been separately owned, separately operated, and separately managed.

Now, because of these difficulties, a majority of the commission have construed paragraph (18) of section 1, mistakenly in my opinion, as empowering the Commission to authorize acquisitions of the physical property of one carrier by another, but the Commission has confined that use of paragraph (18) of section 1 to cases where the carriers concerned were already under common control and parts of the same system, and what was proposed was merely getting rid of certain corporate agencies which were already in the same system, and eliminating the accounting involved. That applied to the Hocking Valley-Chesapeake & Ohio case, which Mr. Fitzpatrick called to your attention. You will find that matter discussed in the Pittsburgh & West Virginia Railway Co. case (150 I. C. C. 81). I wrote a dissenting opinion in that case, because it seemed to me that paragraph (18) of section 1 was never intended to cover the matter of combinations of companies at all, and does not contain the safeguards which should go with such a provision. It seemed to me that it was the intent of Congress that that matter should be handled under section 5, not under paragraph (18) of section 1.

Now I come to the constitutional question, which has been raised by Mr. Fitzpatrick and Judge Heiserman. But before I discuss that, I want to review some of the facts a little. As it happens, I have observed the operations of holding companies in the railroad and public-utility field for upwards of 25 years. Now, I think it is quite clear that it is possible to combine and unite companies just as tightly and effectively for all practical purposes of management through a holding company as by consolidation, merger, or a lease. In fact, it is now the favorite method of combining public utilities. The chief reasons for the use of this method of combination are:

(1) Sometimes to secure certain practical advantages in management, accounting, or financing, which are facilitated by the maintenance of separate corporate identities.

(2) Often to escape public supervision, which is provided in the case of other forms of combinations, like consolidations or leases, but usually not in the case of combination through holding companies.

(3) Often to escape public supervision of security issues, since the securities of holding companies are usually not regulated.

(4) Often to reduce the investment necessary to obtain control, by a process of pyramiding, unloading the remainder on the public.

(5) Often to draw profits indirectly from the controlled companies by making contracts for management, financing, engineering, and the like, which are not subject to public supervision.

The financial exploitation which has taken place in the public-utility field through holding companies is, I believe, one of the major scandals of modern times and a symptom of the disease which has had a good deal to do with bringing about present economic conditions.

Now, fortunately, the operations of the holding companies in the railroad field have been much more limited, and the abuses have not been so great, but the abuses have been sufficient.

In my testimony I described the financial operations of the Van Sweringen holding companies and the Pennroad Corporation briefly, and I think conservatively, and endeavored to show their unsound character. I referred to the extravagant prices which they had paid for stock, to their capitalization, to their accounting, and to their curious charters. So far as I have been able to ascertain, the record contains not one word of contradiction of that testimony. It is asserted, however, that these companies are not holding companies but investment companies. If they are investment companies, they were most atrociously managed. Consider, for example, the investment of $4,500,000 in Seaboard Air Line stock after the panic of 1929.

Mr. WYANT. Mr. Eastman, is it not true that a great many people throughout the country made a similar bad investment in 1929, as well as these holding companies?

Commissioner EASTMAN. There were not so many that made that kind of investment after the panic.

Consider the investment of nearly $38,000,000 in the Pittsburgh & West Virginia at $170 per share, which has never paid more than 6 per cent.

Mr. GARBER. That was paid by the holding companies?

Commissioner EASTMAN. That was paid by the Pennroad Corporation.

Mr. GARBER. A holding company?

Commissioner EASTMAN. That is what I regard it as, a holding company. Judge Heiserman and Mr. Fitzpatrick thought that they were investment companies.

Consider the investment of nearly $13,500,000 in Canton Co. stock at $611 per share. The fact is, these companies were organized and have been used to acquire control of certain carriers, or to secure stock holdings which would make it difficult for others to acquire control. That the Pennroad Corporation is an adjunct of the Pennsylvania Railroad, as found by the New England governors' committee, seems to me quite clear from Judge Heiserman's own testimony, and from the fact that he appeared here to represent both.

Mr. Fitzpatrick apparently conceded that his holding companies have brought the Erie, the Nickel Plate, the Perre Marquette, the Chesapeake & Ohio, the Chicago & Eastern Illinois, and the Missouri Pacific under common control, but he seems to claim, if I understand his testimony, that these carriers are still managed and operated as independent entities. He stresses the fact that they can not have interlocking directors without approval of the commission. The fact is perfectly patent that it is not necessary to have interlocking directors to obtain boards of directors which will manage properties in a common interest. I call your attention to the fact that Mr. Bernet,

who was president of the Nickel Plate, was shifted to the Erie, became president of that road, and then was shifted to the Chesapeake & Ohio, and is now president of that road. If the Chesapeake & Ohio is managed as an independent entity, why should millions of its capital resources have been used indirectly for the purpose of purchasing Erie stock and stock of the Pittston Co., that latter being a company controlling anthracite coal mines and distributing companies?

Mr. HUDDLESTON. In that connection, Mr. Eastman, may I ask you how much of the Wabash assets were invested in the Lehigh Valley?

Commissioner EASTMAN. The Wabash did have investments in the Lehigh Valley stock, and now has, for that matter. I am speaking just from recollection. It is somewhere, I think, between $25,000,000 and $30,000,000. I can ascertain that fact accurately and put it in the record.

NOTE.—The amount is $24,201,223.

The claim is made that these holding companies have been paving the way for consolidations in the public interest. The facts suggest that they have been paving the way with extravagantly expended gold dollars. They have been used in a strategic warfare out of which has at length developed an agreement between the four major railroad interests in eastern territory for division of that territory among them, a plan which they hope to convince the commission that it should approve. At one time there seemed prospects of a fifth system utilizing the Wabash as its main stem on the west, reaching Pittsburgh and the port of Baltimore through the Wheeling & Lake Erie, the Pittsburgh & West Virginia, and the Western Maryland, reaching Philadelphia and New York through the Lehigh Valley, and perhaps linking up with the Delaware & Hudson to gain access to northern New England.

Now, what happened with respect to these railroads? First the Nickel Plate, the Baltimore & Ohio, and the New York Central jointly acquired control of the Wheeling & Lake Erie, in violation of the Clayton Act, as found by the commission, and the Baltimore & Ohio acquired control of the Western Maryland, likewise in violation of the Clayton Act, as found by the commission. Thereafter the Wabash began buying Lehigh Valley stock, and the Delaware & Hudson the stock of both the Wabash and the Lehigh Valley. Finally the Pennsylvania Railroad stepped in and through the Pennsylvania Co. acquired control of the Wabash and the Lehigh Valley, in violation of the Clayton Act, as found by the commission, obtaining the holdings of the Delaware & Hudson at a large profit to the latter. At the same time the Pittsburgh & West Virginia was acquired through the Pennroad Corporation.

In that connection a very large profit was realized from that transaction by the Delaware & Hudson Co., which at that time controlled a railroad and also coal mining and other companies. Later the railroad was separated and put into the hands of a separate corporation, the Delaware & Hudson Railroad Co. That was allowed to assume all the bond outstanding indebtedness of the Delaware & Hudson Co., but the latter retained all those profits from stock transactions.

The fact is clear——

Mr. WYANT (interposing). Just a question there, Mr. Eastman. Was it some individual in the Delaware & Hudson who got the money, or did that thirty-five or forty million dollars go to the company?

Commissioner EASTMAN. Well, the profit that I am talking about here went to the company. Now, I do not know whether any profits were made in connection with sales to the Delaware & Hudson Co.

Mr. WYANT. I understood that when this merger was contemplated a certain individual purchased stock in the Lehigh Valley and the Wabash for about thirty-five or forty million dollars and turned that stock over to the Pennsylvania Co. for something like, $70,000,000 Have you heard anything about that?

Commissioner EASTMAN. No; I am not familiar with that transaction.

Mr. WYANT. It was a rumor. I do not know that it is correct.

Commissioner EASTMAN. There were some transactions in connection with the purchase of the stock of southwestern railroads in which I think Mr. Laree was involved.

Mr. HUDDLESTON. These proceedings you speak about resulted in making the five systems impossible.

Commissioner EASTMAN. Well, the statement was made by Judge Heiserman or Mr. Fitzpartick that the Pennsylvania Railroad Co. offered to give up those stocks and sell them to anyone that wanted to bring about the fifth system, but manifestly the creation of that fifth system is now within the discretion of the Pennsylvania Railroad so long as it controls the Wabash and the Lehigh Valley stock.

Mr. HUDDLESTON. The Lehigh Valley stock was purchased by the Wabash before control in the interest of the Wabash was acquired by the Pennsylvania Co., so that in order to get control of the Lehigh Valley the Pennsylvania Co. had to get control of the parent company—that is, the Wabash Co.

Commissioner EASTMAN. A large block of the Lehigh Valley stock was held by the Wabash, of which the Pennsylvania acquired control. Other Lehigh Valley stock was obtained by the Pennsylvania from the Delaware & Hudson, and I think it purchased still other Lehigh Valley shares in the open market, although I am not sure as to that. Of the roads which I have mentioned as possibly going into a fifth system, the strongest financially were the Lehigh Valley and the Delaware & Hudson.

The fact is clear beyond dispute that these holding companies have been bringing carriers under common control and hence combining them without any supervision or approval by the commission. The 4-system plan is now offered to straighten out the situation. If it is approved, the systems may in time be adjusted accordingly. If it is not approved, and as the law now stands, the controls which have been secured will doubtless be retained except as they may be broken up by Clayton Act proceedings. But in either event the funds which have been expended in securing these controls will remain spent, and the debt which has been incurred will remain outstanding.

The bill before you is an attempt to bring the process of railroad unification under effective public control and supervision and to forestall for the future such unsound financial operations as have taken place in the past. It is a demonstrated fact that the process of railroad unification is very far from being under effective public control and supervision at the present time.

I come now to the constitutional question.

Mr. HOCH. Just before you discuss the other question, Mr. Eastman, I would like to ask this question: Is there anything in the law now, leaving out of consideration the antitrust acts, that makes it unlawful to acquire stock of another carrier if it is short of control?

Commissioner EASTMAN. Not if it is short of control.

Mr. HOCH. What I have in mind is that this provision with reference to divestiture provides divestiture not simply in connection with cases where control has been acquired but provides for it in those cases where in the opinion of the commission the stockholding may constitute an influence that tends to defeat the plan, or rather to prevent the plan from going into effect. Now, in providing for divestiture of holdings of that stock, does it not seem rather incomplete to have no provision for supervision over the original acquisition? That is, you can go ahead and acquire stock that falls short of control without violating the law, but after acquired you would have power, under this divestiture clause to order divestiture on the theory that it was an influence contrary to the plan.

Commissioner EASTMAN. I think there is some logic to what you say.

Mr. HOCH. The thought I had in mind is this: If we are going to give that power with reference to divestiture, should we not give it also with reference to acquisition? It seems to me that the law would be incomplete unless we did.

Commissioner EASTMAN. Personally I would not object to that. I think it would be desirable to put some limitation on that—to provide that the acquisition of more than a certain percentage of the stock of a company would require approval, so that we might not find it necessary to supervise transactions of little consequence consisting of the purchase of small lots of stock perhaps for some insurance or other similar fund of the railroad company, and so on.

I come now to the constitutional question which has been very persuasively raised by Mr. Fitzpatrick and seconded by Judge Heiserman. As I understand this question the contention may be very briefly stated. It is that the holding companies are not engaged in interstate commerce, but merely in the purchase and holding of securities, which is not interstate commerce, and that the mere ownership of securities, whether by companies, or by individuals, can not be regulated by the Federal Government under the commerce clause or any other provision of the Constitution.

Now, it seems to me that that is precisely the question which was raised against the Government in the Northern Securities case. As a matter of fact Judge Heiserman supported his argument by reference to the dissenting opinion in that case. Let me quote from that dissenting opinion by Mr. Justice White.

Mr. GARBER. What is the citation?

Commissioner EASTMAN. That is 193 U. S. 197. I am quoting from page 368. This is the question which Mr. Justice White thought was raised by that case.

> The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus

conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all.

Now, that was the question presented and argued, as stated by Mr. Justice White's dissenting opinion in that case.

Now, I quote from the majority opinion, on page 334.

In this connection, it is suggested that the contention of the Government is that the acquisition and ownership of stock in a State railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in expressed words and at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in State railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Co. can acquire and hold stock in other State corporations. Still further, it is asked generally whether the organization or ownership of railroads is not under the control of the State under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that the Congress can control the organization of State corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appro priate and that are lawful and not prohibited by the Constitution. It does con tend that no State corporation can stand in the way of the enforcement of the national will, legally expressed.

Now, this question was discussed with great clarity, it seems to me, in Mr. Breckenridge's statement, contained in the report which this committee published, House Report No. 2789 of last year——

Mr. GARBER. What is the number of that report?

Commissioner EASTMAN. No. 2789. I want to quote a little from his statement made in that connection. This is on page 36, volume 1, Regulation of Stock Ownership in Railroads, 1931.

Bringing this line of thought down to our specific problem, it might be considered that stock ownership in a railroad constitutes no burden—at least, no direct burden—on interstate commerce though it might be otherwise as to what was done by the stockholders pursuant to such ownership. Equally stock ownership without more would be thought no interference with the power of Congress to regulate commerce. But however that might have been as an original argu ment, it is believed that it comes nearly 30 years too late. In the Northern Securities case a holding company was formed to take over the stock of the Great Northern and Northern Pacific Railways. It did so and the Federal Government brought a bill in equity against it and others alleging violations of the Sherman Act. There were charges and discussions of combination, conspiracy, lack of consideration, and so forth, but these were to bring the activity within the language of the act said to have been violated. What was really objected to, and the dissenting opinions make this sufficiently clear, was the acquisition by a holding company of stock control of two competing railroads. And that is what the decree undertook to do away with. After the decision of that case whose result has always since been recognized as sound, it seems too late to say that controlling stock ownership in railroads by a holding company can not be a burden or restraint on commerce, and a sufficiently direct one for Congress to attack if other requisite reasons exist for it. The particular policy of Congress there obstructed was that competition should be preserved. Holding company ownership of stock in end-to-end or distant noncompetitive carriers would have been without offense so far as the antitrust law went. But Congress now has another policy announced in the transportation act, that of well-balanced, independent regional systems. This broad general object seems to have Supreme Court approval.

The statement, as printed, is supplemented by notes showing the cases to which reference is made.

That the policy of the transportation act goes further than to keep competing lines apart is shown by its requirement in one section of commission approval for the acquisition by one railroad of a controlling stock interest in another, however they may be situated, and that specific section, too, seems to have Supreme Court sanction (Chicago Junction case). If the congressional will of the nineties that competing railroads be kept competing could be violated by holding company control of two such lines, its plan in 1930 for independent regional systems can certainly be interfered with by holding company stock control of two railroads meant for other relationships, and a congressional direction that no such control shall be acquired except with the approval of the commission on a finding as to the public interest would seem well within its constitutional power. Property rights would be forced to yield here in favor of this policy as they were before on the somewhat narrower policy concerning restraint of competition.

Now, Mr. Fitzpatrick conceded the point, it seems to me, when he answered a question which was asked him by Mr. Hoch, as follows:

If you are dealing only with the subject of ownership then I do not see how you can do it, Mr. Hoch; but if you are dealing with ownership coupled with utilization, you may say, if that ownership is such that interstate commerce is affected, then you come straight back to the principle of the Clayton Act or the Sherman Act.

It is conceded that Congress has plenary power to adopt and enforce a rule for the regulation, protection, or fostering of interstate commerce, and that such a rule may apply to acts which began before the rule was adopted. As Mr. Fitzpatrick told you, "It seems to make no difference, particularly, if you grant the subject is one of interstate commerce, whether Congress looks forward or looks backward." It is conceded that in the Sherman Act, Congress adopted such a rule and that under the law the Government could break up ownership of stock which had the result or the effect of causing a violation of that rule. What does not seem to be appreciated is that the same principle applies to any other rule that Congress may adopt for the regulation, protection or fostering of interstate commerce. There seems to be an assumption, conscious or unconscious, that there was some perculiar sanctity in the rule of the Sherman Act because it undertook to preserve competition and prevent restraint of trade and that the same sanctity would not attach to another rule which undertook to regulate interstate commerce in a different way, notwithstanding the Supreme Court has explicitly stated that it will not pass upon or be governed by the wisdom of the particular rule adopted by Congress, indicating at the same time the possible weaknesses and dangers of the rule in the Sherman law.

The fact is that Congress has modified the rule in the Sherman law. It has decided that the policy of unrestricted competition is unwise, and has substituted instead a plan limiting competition, under which the interstate commerce of the railroads is to be carried on by a limited number of systems, well balanced and with substantially equal earning power and put together under the complete supervision of the agency of Congress, namely, the Interstate Commerce Commission, and only after that commission has found that each particular combination will be in the public interest and had approved the terms and conditions of the transaction, the terms and conditions being just as important as the transaction itself. Congress has just as

much right, it seems to me, to protect and enforce this new rule for the regulation of interstate commerce carried on by the railroads as it had to protect and enforce the old rule in the Sherman law, and this includes the right to interfere with any ownership which is utilized to defeat, hamper, or impede the rule. Moreover, it is clear that any common control brought about through a holding company might defeat, hamper, or impede a rule quite as effectively as an actual consolidation of the same companies.

Mr. HOCH. Perhaps I did not follow you very clearly, but I did not get from your reading of the extracts from the opinion in the Northern Securities case the interpretation you placed on it. As I understand the majority opinion contained in the extract which you read was that the court denied that it was faced with the naked question of whether Congress had power to regulate the mere ownership of stock. The dissenting opinion held that it was faced with that question and refused to uphold the power of Congress to regulate the mere ownership of stock. I understand that the majority held it was not faced with that question but with what was done with that stock. In other words, the utilization of it, in the terms of Mr. Fitzpatrick.

Commissioner EASTMAN. That is just the idea I was endeavoring to convey.

Mr. HOCH. I do not see how it could be contended that that decision upholds the contention that the mere ownership of stock in two or more companies, engaged in interstate commerce, gives jurisdiction to us.

Commissioner EASTMAN. I do not think it does, Mr. Hoch; that is not my view at all. I was endeavoring to make this point, that in the Northern Securities case the same constitutional question precisely was raised against the Government as is being raised against this bill here. Now the court found that the Government could interfere, under the Sherman Act, with the ownership of stock which had been brought about by that holding company, to the extent that utilization of that ownership hampered and impeded the rule of Congress for the regulation of the interstate commerce carried on by the railroads.

Mr. HOCH. Yes, but it is not the contention that this gave jurisdiction over the mere ownership, but the utilization of that ownership; that is the contention.

Commissioner EASTMAN. That is the contention; that was the contention in the Northern Securities case.

Mr. HOCH. And the court refused to pass on the naked question and held that it was the utilization which in that case gave jurisdiction.

Commissioner EASTMAN. That is the point I made.

Mr. HOCH. And it is your view we are asked, in this bill, to legislate respecting the utilization of the stock rather than ownership.

Commissioner EASTMAN. Yes.

Mr. HUDDLESTON. Mr. Hoch, was it held in that case that actual utilization was necessary to bring it within the power of Congress or merely that it would bring it within the antitrust act to secure competition? I understand from what Mr. Eastman has said, that it held that so far as the Constitution is concerned Congress has the same power to promote monopoly as it would have to promote competition, just whichever Congress wishes to promote.

Commissioner EASTMAN. The policy with respect to interstate commerce.

Mr. HUDDLESTON. Now the possibility of utilization seems to me to be a proper subject of congressional interest under the Constitution. That was the thought back of the decision on the Volstead Act, in which it was held that Congress could prescribe what was admittedly an arbitrary standard of alcoholic content, because if none was prescribed and the test was made of intoxicating in fact, it would make enforcement more difficult. So if we were required to prove utilization of the power to control in order to give jurisdiction it probably would mean it would be much more difficult to enforce the law.

Mr. HOCH. That is to say, if I might interpose, that if Congress decides to supervise the mere ownership as a necessary means of regulating commerce, it has power to do so.

Mr. HUDDLESTON. Yes.

Commissioner EASTMAN. My point is this, and it is practically the same as yours, if I understand you, that Congress has the right to adopt whatever rule its wisdom dictates for the regulation, protection, or fostering of the interstate commerce carried on by the railroads, and that after it has adopted such a rule the Government may interfere with ownership of stock the utilization of which defeats, impedes or hampers the operation of that rule.

Mr. HUDDLESTON. It occurs to me that you might go still further and say that Congress has the power to interfere with an ownership which might be utilized or which has the potentiality of utilization.

Commissioner EASTMAN. Within certain limits I should think that would be so.

Mr. HUDDLESTON. And that is what this bill does.

Mr. MAPES. I want to ask Mr. Eastman a question about this divestiture provision along the line of the question asked by Mr. Hoch a moment ago. Before I do that I want to make sure that I correctly understood what the bill tries to do.

As I understand it, the Interstate Commerce Commission, under existing law, has no control over holding companies, not common carriers, of the stock in common carriers, and this bill, among other things, is to give the Interstate Commerce Commission control over such holding companies that acquire the control of the stock of two or more railroads.

Commissioner EASTMAN. Yes; that is, the intention of the bill is to put under the jurisdiction of the commission the combining of railroad properties through the medium of a holding company. It also provides that if such a combination through a holding company is permitted, then that holding company shall come under the jurisdiction of the commission with respect to its stock and with ——

Mr. MAPES (interposing). But leaving out of consideration the word "combining," as I understand the bill, it makes it unlawful for any holding company to acquire—makes it unlawful "for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock" without any reference to what it intends to do with that control; is that right?

Commissioner EASTMAN. Yes; unless that is approved by the commission.

Mr. MAPES. Yes.

Commissioner EASTMAN. Yes.

Mr. MAPES. The purpose is to put the holding company in such a case under the jurisdiction of the commission.

Commissioner EASTMAN. Yes.

Mr. MAPES. And it does not interfere with any holding company which does not acquire the control of a carrier; is that true?

Commissioner EASTMAN. That is correct. I should qualify that answer, however, with the statement that the divestiture provision, as Mr. Hoch has pointed out, would give authority to interfere with the holding of railroad stock by holding companies which was resulting in impairing the independence, one of another, of railroad systems provided for in the commission's plan.

Mr. MAPES. What Mr. Hoch pointed out was with reference to past acquisitions but not the future acquisitions.

Commissioner EASTMAN. Yes.

Mr. MAPES. Now, with reference to divestiture of the stock already acquired by holding companies, the bill provides that the Interstate Commerce Commission shall—

> investigate and determine whether the holding by any person of any part of the stock or other share capital of any carrier, unless acquired before February 28, 1920, or unless acquired with the approval of the commission, is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of any part of such plan or impairing the independence, one of another, of the systems provided for in such plan, by reason of subjecting such carrier to the control, domination, or influence of another carrier.

And, that—

> if the commission finds, after such investigation, that such holding has or is likely to have any of the effects so described, it shall by order require such person to divest himself of such stock or other share capital, or of the voting power thereof, to the extent, within the time, and in the manner prescribed by the commission as necessary for the protection and furtherance of such plan.

As I understand it, that provision would not authorize the commission to cause the divestiture of any stock which it does not or is not likely to be the cause of interfering with any tentative plan which the commission has.

Commissioner EASTMAN. Or with the independence of the separate systems provided for in that plan.

Mr. MAPES. Now to cite an example, the holdings of the Pennroad in the New York, New Haven & Hartford has been frequently referred to in these hearings—would this bill require the commission to divest the Pennroad of that stock?

Commissioner EASTMAN. It might; yes.

Mr. MAPES. That is the point that I would like to have you elaborate on, if you will. How would the holdings of the Pennroad in the New Haven interfere with the 4-system plan?

Commissioner EASTMAN. It would not interfere with the 4-system plan. Take the commission's plan of consolidation, which has been adopted, and which is not yet modified. That provides for a separate New Haven system and a separate Boston & Maine system. Each was given, also, certain bridge lines extending into trunk-line territory. The intention was that those systems should be separate independent systems. Now, suppose it could be shown that the direct holdings of the Pennsylvania Co., or the holding of its adjunct, the Pennroad Corporation, in the stock of the New Haven or the Boston & Maine subjected either of those carriers to domination, control, or influence by the Pennsylvania Railroad, so as to impair the independence of either as a sepaate system, then the commission could cause the divestiture of those holdings. That, as a matter of fact, is what the New England Governors' Committee, in this report, thought ought to be brought about.

Mr. MAPES. I see. There is another question about divestiture that I want to ask you. Have you in mind just what the procedure of the commission would be in causing a holding company to divest itself of stock in these railroads?

Commissioner EASTMAN. No; I have not given any particular thought to that. I assume that the procedure would be like that which is now followed in the Clayton Act cases, where the commission enters an order that within a certain time the company shall divest itself of all stock which it has acquired in violation of the Clayton Act, and divest itself under certain conditions. Usually those orders restrict the purchasers of the divested stock. In addition, in order to prevent a forced sale and unnecessary loss, the commission, in two cases, has agreed to a temporary compliance with the order by the placing of the stock in the hands of independent trustees, until further order of the commission.

Mr. MAPES. Of course, these are abnormal times and legislation, perhaps permanent legislation, at least ought not to be passed based upon present abnormal conditions. Investments and securities generally have greatly depressed in value. The investment experts seem to feel that present prices are not normal and do not indicate real value. If these holding companies were required now to divest themselves of stock acquired in 1920 or between 1920 and the present time at the inflated prices it might work hardship on those who have made investments. What have you to say about that situation?

Commissioner EASTMAN. Well, that is why, I take it, the bill provides, on page 7, that—

> The commission, in its order requiring any such divestment, shall provide for a trust agreement for a limited period or other appropriate measures for the purpose of enabling such person to realize at least the fair normal market value of such tock or other share capital.

Mr. MAPES. What have you to say with respect to a law which substitutes the commission's judgment for the judgment of the actual owners of the securities as to when they shall dispose of them, bearing in mind that the investments were perfectly legal when they were made?

Commissioner EASTMAN. Well, I think I covered, or attempted to cover, that point in my previous testimony by pointing out that any purchase of stock, just as in the case of the Sherman Act, is made in the light of the paramount and plenary power of Congress to regulate interstate commerce.

Mr. MAPES. You feel, then, that the public interest requires the passage of legislation which will authorize the commission, in the regulation of interstate commerce, to cause these divestitures back to February 28, 1920, and not merely to make them illegal for the future?

Commissioner EASTMAN. Yes, it seemed so to me; that is why I approved the bill. I do not believe that the commission would exercise that power in any arbitrary or any unreasonable way, but only in

exceptional cases where there was a very clear showing that the results specified in the bill were being accomplished.

Mr. MAPES. You feel that without this retroactive provision the Interstate Commerce Commission could not adequately handle the situation?

Commissioner EASTMAN. It would not seem so to me. Of course, some of the holding companies might get into financial difficulties and their stockholdings might be dissipated in that way.

Mr. MAPES. The holders of real estate and bonds and the holders of every kind of securities now are finding themselves in positions where the present market value of the securities are much less than what they paid for them. But, they hope, at least, that, by holding on, the situation will work itself out, so that they will realize more on their investments than they could realize now. Applying the same kind of reasoning to these holding companies, the question naturally arises as to whether the people who made that at the time was a legal investment might not think this was rather violent legislation.

Commissioner EASTMAN. As I say, I think the bill endeavors to protect them and that the commission would not operate in any arbitrary or unreasonable way under that provision. I do not think its record in the administration of the Clayton Act indicates that it would It has already in two of these proceedings consented to trust agreements, in order to prevent the sale of stock under depressed market conditions.

Mr. MAPES. I can appreciate that perfectly well, but I can see how an investor might think that he ought to have the right to pass upon that himself inasmuch as he has made what was at the time a legal investment.

Mr. GARBER. I have one question, Mr. Chairman.

Mr. HUDDLESTON. Mr. Garber.

Mr. GARBER. In exercising the power of divestiture paragraph (6) provides that it shall be so exercised as to enable "such person to realize at least the fair normal market value of such stock or other share capital."

Are you not introducing a new term into the law in the use of the term "normal" instead of fair market value? You introduce a term "normal," which of course might refer back to some period or to an indefinite period. We refer now to normalcy of values in 1926, for instance, or a longer period. Why is that necessary; do you take that term from some decision; is it a legal term?

Commissioner EASTMAN. I commented on that in my previous testimony, and I think I can explain, in answering your question, by reading what I said then, as well as in any other way.

If, instead of the divestment procedure in paragraph (6), provision should be made for condemnation of the shares under the power of eminent domain, the holder would be entitled to their fair value, and the present market value would, I take it, certainly be very persuasive evidence as to that fair value.

Perhaps not the sole evidence, but it should be some evidence.

While evidence as to the earning power in the future would no doubt be admissible, it might be difficult under present conditions to establish reasonable assurance of enhanced earning power in the future. In drafting paragraph (6), however, it was felt that the stockholder should in all fairness be protected against a forced sale under present market conditions. For that reason the expression "fair normal market value" was used. We all believe that the present situation

is temporary and that present market values are not normal. If they persist, they may, of course, become normal. but the provision in the bill was intended to afford reasonable protection until the future becomes more clearly defined. I realize that it is quite possible that the wording of this provision can be improved, but I have endeavored to indicate the idea behind it.

Now, as I say, that is an unusual provision and an unusual expression, but it was adopted for the reasons indicated.

Mr. GARBER. I understand it was adopted out of an abundance of precaution to protect the holders of the stock.

Commissioner EASTMAN. That is right.

Mr. GARBER. But in doing so are you not making the provision unworkable and impracticable?

Now there is just one other question that I want to ask you in that connection, and that is whether or not along with exercising the power of divestment the commission could not be authorized to exercise the power of desisting from any control that might emanate from or out of holding of stock and in that way answer the same purpose as requiring the divestment of stock?

Commissioner EASTMAN. Well, that may be covered by the paragraph as it is now drawn for it uses this expression:

Shall by order require such person to divest himself of such stock or other share capital, or of the voting power thereof.]

In other words, it might not require the sale of the stock at all but merely the transfer of voting power to some other authority.

Mr. GARBER. There is one other question that I want to ask.

Mr. HUDDLESTON. Mr. Garber.

Mr. GARBER. Unfortunately I was not here when you testified and did not have the benefit of your exposition of the various sections, but I noticed that under your special comment upon the costs, the unnecessary costs, which finally settled down into the base rate level of unification, you say that one of the worst features of the railroad situation, from a financial point of view, is the extent to which the property has been mortgaged, and the heavy loans and fixed charges of every kind. Now, in the ordinary case, the lease has this disadvantage of converting a contingent return on stock into fixed rental charge. Where this is done it has the same effect as though the stock is converted into a mortgage bond. The acquisition of control through stock purchases also very largely result in a fixed charge, because the ordinary railroad can procure funds for such purposes in the long run only by the sale of bonds or giving notes, and then again you say this matter of putting it through the railroads to get it, of course, is one which has certain appeal to bankers, and so forth, who are always looking after their commissions. This is my interpretation of these unifications.

Now the bill drops paragraph C from the law and you say that this is fully justified by the authority given the commission in paragraph 20a, I believe it is.

Commissioner EASTMAN. Yes.

Mr. GARBER. 20a; now 20a, while it gives full authority to the commission to limit the amount of bonds and stocks and so forth, yet the law itself does not put any limitation upon the commission, while paragraph B does. Paragraph B reads:

The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the commission.

Your justification is that this would result in too much delay in determining the value, as I understand it.

Commissioner EASTMAN. That is one of the reasons. I think it is rather impracticable of application, also, because it requires us to ascertain the value of the properties of the companies.

Mr. GARBER. To be consolidated?

Commissioner EASTMAN. To be consolidated. Not only the property which is used for railroad purposes but the property which is of a nonrailroad character, such as securities of other companies, and so on. And I also pointed out, I think, in my testimony on section 15a, that it is very difficult to apply that provision at all where stock is issued without par value. Now I think the limitation imposed there is of no value in many cases. The stock or capitalization of consolidated corporations ought in many instances to be held down below that limit. Instead, that provision has been urged by the railroads as giving them the right to bring the capitalization up to that limit. I do not think it ought to be construed that way, but that argument was made. There are probably more railroads which have a capitalization below the value fixed by the commission than which have a capitalization above that value.

Mr. GARBER. That paragraph has been commented upon very favorably by the Supreme Court as being a protection to the investor in stock and an inducement to invest capital, as giving confidence to such investors.

Commissioner EASTMAN. I do not think it has.

Mr. GARBER. I believe that in a recent decision they commented very favorably upon that paragraph.

Commissioner EASTMAN. I would like to have a reference to it. I have overlooked it if there is such a case.

The CHAIRMAN. Mr. Lonergan.

Mr. LONERGAN. Mr. Eastman, I have been very much interested in your reference to railroads in New England, like those represented by Mr. Ogden and Mr. Pelley, the Pennsylvania Railroad and the New York, New Haven & Hartford Railroad Co. Mr. Ogden said that the Pennsylvania exerted no influence whatsover on the New York, New Haven & Hartford and Mr. Pelley said that the Pennsylvania in no way exercised an influence over the affairs of the New York, New Haven & Hartford road? Have you any comment to make on that?

Commissioner EASTMAN. I have no comment other than that which I have made. I think that matter is covered in the quotation which I read from the New England governors' committee.

Mr. LONERGAN. I am familiar with that.

Commissioner EASTMAN. Yes. Even if they do not exercise any influence now it is possible for them to do so at any time when they feel it is advisable to do so. I believe, although I am not fully informed in regard to this, that considerable evidence in regard to that matter was offered by the New England governors' committee before the commission in a recent hearing in respect to the 4-system consolidation plan, that evidence indicating that the Pennsylvania Railroad was receiving favored treatment. But, as I say, I have not gone over that evidence and am not fully informed in regard to it.

Mr. HUDDLESTON. Mr. Corning.

Mr. CORNING. Mr. Eastman, I would just like to get one matter cleared up. Under the Sherman Act you can compel holding companies to divest themselves of their holdings in parallel competing lines, as I understand it.

Commissioner EASTMAN. Yes; or where any restraint in trade is brought about.

Mr. CORNING. Yes. Now, then, what the Interstate Commerce Commission is asking for, as I understand it, is that they have the same power to tell these railroads that they must divest themselves of stock, we will say, that is not held contrary to the Sherman Act. Now, does not the bill either prevent consolidation or compel consolidation, according to the Interstate Commerce Commission's plans?

Commissioner EASTMAN. I do not feel that it would, Mr. Corning. What we are proposing in this bill is a means of protecting the policy which we understood Congress to have adopted in section 5 of bringing the unification of railroad properties under the complete supervision of its agency, the Interstate Commerce Commission. Now, we do not feel that this is under complete supervision at the present time. I am unable to see how this bill would compel certain consolidations to be made. It would enable the commission, in certain cases, to remove obstructions, but I am unable to see how it would compel any consolidation to be brought about.

Mr. CORNING. Well, if it will not compel them or help prevent the consolidation, the converse of what you state is true; and there is a question in my mind as to whether the bill does not go too far or does not go far enough; that is, that it does not defeat its own purpose.

That is all, Mr. Chairman.

Mr. HUDDLESTON. Mr. Eastman, will it be convenient for you to be with us to-morrow?

Commissioner EASTMAN. With the exception that I have an appointment, and I do not know that I can get through before 10.

Mr. HUDDLESTON. We do not like to detain you so much, but I am satisfied that several members will want enlightenment on many questions that will come to their mind if you can be with us to-morrow.

Commissioner EASTMAN. Would there be any objection if I should be a few minutes late?

Mr. HUDDLESTON. If it suits you better, the committee can meet at 10.15.

Commissioner EASTMAN. That will be satisfactory to me.

Mr. HUDDLESTON. Then the committee will adjourn until 10.15 o'clock to-morrow.

(Thereupon, at 11.45 o'clock a. m., an adjournment was taken until 10.15 o'clock a. m. of the following day, Thursday, March 24, 1932.)

REGULATION OF RAILROAD HOLDING COMPANIES

THURSDAY, MARCH 24, 1932.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10.15 o'clock a. m., Hon. George Huddleston presiding.

Mr. HUDDLESTON. The committee will please come to order. We have with us again this morning Mr. Eastman, who has very kindly returned for any questions that members might like to ask him.

STATEMENT OF HON. JOSEPH B. EASTMAN, COMMISSIONER INTERSTATE COMMERCE COMMISSION

Mr. HUDDLESTON. It occurs to me to inquire of Mr. Eastman, before we start, whether there is anything additional he wants to add to his previous statement?

Mr. EASTMAN. Nothing, Mr. Chairman.

Mr. HUDDLESTON. Then, any of the members of the committee who desire to interrogate Mr. Eastman, may do so now.

Mr. WYANT. Mr. Eastman, I have been a member of this committee for a number of years, and I want to say I do not think I have ever listened to a more able or interesting discussion of any bill than has been presented by both the opponents and proponents of this bill. There are just a couple of questions I would like to ask you. The first is this:

Have these holding companies done anything up to the present time that has retarded the consolidation of the railroads and, if so, what have they done?

Mr. EASTMAN. Well, that is a difficult question to answer, Mr. Wyant, because it is purely a mater of speculation, it seems to me, as to what might have happened if they had not operated. Of course, I do not know what might have happened in that event. They have been working toward certain combinations of railroads, and have also been working against certain other combinations of railroads.

Now, if the commission approves those that they have been working toward, of course, they have facilitated those combinations. If it does not approve those that they have been working toward, then they have been obstructing railroad consolidations. It depends a great deal upon what action is finally taken by the commission, it seems to me.

Mr. WYANT. Mr. Eastman, that is just what I had in mind. In the event the commission approves of a 4-party plan or a 5-party plan, certain railroads will be allotted to one of the parties. In the acquisition of the control of one of the roads, these roads will either have to purchase the stock directly or secure it by lease, or otherwise, in order to get the control that you are assigning to that road, will they not?

Mr. EASTMAN. Yes.

Mr. WYANT. Now, as Judge Heiserman stated, from his point of view, if the 4-party plan should be approved by the commission, the action of the Pennroad and the Pennsylvania then would be in the furtherance of a 4-party plan, in so far as the purchase of the stock of certain lines is concerned, would it not?

Mr. EASTMAN. I understand that the four railroad interests who are promoting that plan have agreed that if it is approved, as proposed by the commission, they will facilitate the transfers of stock that are necessary to bring it about.

Mr. WYANT. You referred yesterday to the Lehigh Valley and the Wabash Railroads. Under the 4-party plan, the Lehigh Valley will be taken from the Pennsylvania and given to some other company, is that correct?

Mr. EASTMAN. I understand so.

Mr. WYANT. And the Wabash Railroad is now in the hands of a receiver and probably will be for some time?

Mr. EASTMAN. It is now in the hands of a receiver. I do not know how long it will remain there.

Mr. WYANT. I think it will be for some time.

Then those two roads could not in any way interfere with the consolidation process, could they?

Mr. EASTMAN. Well, suppose the commission adhered to its present plan or thought that some modification ought to be made which would be different from the 4-system plan which is proposed, then it seems to me that those holdings might easily interfere.

Mr. WYANT. Mr. Eastman, your tentative plan was filed a couple of years ago?

Mr. EASTMAN. Well, a tentative plan was filed a good many more years ago than that.

Mr. WYANT. Your complete plan.

Mr. EASTMAN. The complete plan was adopted in 1929, I think.

Mr. WYANT. Yes. That is what I meant. I got them mixed up.

The railroads have filed an application to modify that plan, is that correct?

Mr. EASTMAN. Correct.

Mr. WYANT. That case is completed, so far as hearings and arguments are concerned, is it not?

Mr. EASTMAN. Not the arguments; the hearing have been completed.

Mr. WYANT. And on the 26th of this month, the case will be placed in the hands of the commission, is that correct?

Mr. EASTMAN. I do not know as to that. My impression is that the briefs will be filed at that time. I do not know when it is set for argument before the commission.

Mr. WYANT. What I had in mind was this: That in view of the situation, the possible decision of the commission at an early date, would it not be well from that standpoint to defer any legislation of this kind until the commission decides that question that is before it?

Mr. EASTMAN. I do not see why it would be. The passage of this bill would not interfere in case the commission should approve the 4-system plan which is proposed, and if it should not approve it, it seems to me that this bill would put the commission in a much better position to deal with the situation. Of course, also, the bill covers the entire country and is not confined to the immediate territory to which the 4-system plan relates.

Mr. WYANT. That is all for the present, Mr. Chairman.

Mr. HUDDLESTON. The fear has been expressed that the provision of this bill which authorizes the commission to require divestiture might cause a sacrifice of railroad securities, might result in such securities being thrown on the market, breaking the market, and having generally a bad effect. I want to ask you whether you considered divestiture as an essential feature of this bill?

Mr. EASTMAN. I think it is a very desirable feature of the bill. I think that the rest of it would be desirable, however, even without the divestiture part.

Mr. HUDDLESTON. The purpose of the bill is to deprive holding companies of control of certain carriers. Now, can that not be achieved without going to the extremity of requiring them to divest themselves of the ownership of those stocks?

Mr. EASTMAN. I would not want to agree that the purpose of the bill is to compel the holding companies to divest themselves of certain securities.

Mr. HUDDLESTON. I mean, in certain events.

Mr. EASTMAN. In certain events, that would result.

Mr. HUDDLESTON. I wonder if it would not be possible, to so draft this bill as to eliminate the feature of actual divestiture by rendering nugatory for purposes of control any ownership of the holding companies in this stock, such as by trusteeing it, or depriving it of voting power, or some other means that would accomplish the same purpose.

Mr. EASTMAN. That, it seems to me, is exactly what is proposed in this paragraph 6. It gives the commission power to require such person—meaning a "person" as defined in the bill—"to divest himself of such stock or other share capital, or of the voting power thereof," so that the divestment might be only of the voting power without compelling any sale of the stock whatever, or any transfer of the stock.

Mr. HUDDLESTON. Unless the commission should otherwise order.

Mr. EASTMAN. Yes. Then it goes on to say—

> The commission, in its order requiring any such divestment, shall provide for a trust agreement for a limited period or for other appropriate measures for the purpose of enabling such person to realize at least the fair normal market value of such stock or other share capital.

I do not believe, personally, that the authority given under paragraph 6 would be very widely exercised. I should suppose that it would be exercised only in exceptional cases; that there would be no widespread compelling of divestment; and that if any divestment was required, the commission, proceeding in accordance with the obvious intent of the statute, would take measures to protect against a forced sale which would result in an undue loss on the securities.

Now, of course, if their values never increase, never return to what we now regard as normal, the owners are not going to benefit, even if they are not required to sell. This provision, however, enables the commission to protect the holders against an immediate forced sale and to allow a period of time in which the market may return to what is regarded as normal before any divestment is required.

Mr. HUDDLESTON. It gives the commission power, to require divestmentures?

Mr. EASTMAN. It does, under certain circumstances.

Mr. HUDDLESTON. Can not the same purpose be accomplished without that power? Say that we give the commission power to require that the stock be trusteed, would not that accomplish the same purpose?

Mr. EASTMAN. I think that would accomplish the purpose that is in mind here; yes.

Mr. HUDDLESTON. To be trusteed unless and until the owners choose to make a sale of it.

Mr. EASTMAN. I am not enough of a lawyer to know whether you can provide for an indefinite trusteeing or not.

Mr. HUDDLESTON. If we can trustee it temporarily, I think we can trustee it until such time as the owners choose to make a sale of it.

Mr. BECK. If I may supplement what the acting chairman is saying, in the dissolution of the anthracite coal trust, my impression is—I am only speaking from memory—that a very large block of stock was trusteed for a long while until the dissolution was completed.

Mr. EASTMAN. Well, at the present time, the stock of the Central Railroad of New Jersey, which was held by the Reading Co., is in the hands of trustees, the equitable ownership being in the Reading. That arrangement has continued, I think, for a long period of time; has it not, Mr. Beck?

Mr. BECK. So far as I know, it is still continuing.

Mr. HUDDLESTON. Without going to the point even as far as requiring trusteeing of this stock, I would like to have your view of a provision which would deprive the holding company of the power to vote the stock, or to use it in any other manner. Would that answer the purpose?

Mr. EASTMAN. I should be inclined to think offhand that depriving of the power to vote would accomplish the purpose, with this possible exception, that if the holding was of large proportion of the outstanding stock, a trustee arrangement might be better, so that there would be somebody who could vote that stock in order to provide for the management of the company. If you simply deprive the stock of voting power, you might be placing the management of the company in the hands of a small minority of the outstanding stock.

Mr. HUDDLESTON. I had in mind the legal point which you raised as to whether we had the power to trustee the stock. I take it that we have unquestionable power to forbid the use of the stock for purposes of control, either directly or indirectly. That has been sustained, I take it, by the antitrust law decisions, and my reason for making the suggestion of limiting our action to that point was to eliminate the legal question.

I personally have very little doubt on the legal point, but there may be some doubt.

Mr. EASTMAN. The trustee plan was followed, I know, in the case of various holdings acquired by the New Haven Railroad at the time Mr. Mellen was president. The New Haven had acquired control of the Boston & Maine and of certain steamship companies and of certain trolley properties and suit was brought by the Department of Justice under the antitrust statutes. A decree was entered which provided for placing the Boston & Maine stock and the trolley stocks and also, I think, certain steamship company stocks, in the hands of trustees.

Those arrangements continued for a long time. Afterward, I think, some of them were suspended by agreement of the parties, and the New Haven was allowed to resume direct ownership. But the trustee arrangement was used in that instance for a considerable period of time.

Mr. HUDDLESTON. Of course, the trusteeing provision is defensible only on the theory that it is necessary to avoid abuse of this ownership.

Mr. LONERGAN. Mr. Chairman, I would like to ask a question at this point. As I remember it, that was an agreement between the Department of Justice and the New York, New Haven & Hartford Railroad as to the holding of the stock of the trolley system by trustees.

Mr. EASTMAN. Yes. The stock of the Connecticut Company, for example, was in the hands of trustees for a long period of time and my understanding is that they managed that property very well.

Mr. LONERGAN. But that was a matter of an agreement between the New York, New Haven & Hartford and the Department of Justice, and not as a result of any litigation.

Mr. EASTMAN. Well, the litigation was started, and then an agreed decree was entered by the court, as I recall it.

Mr. BECK. In the first place, supplementing what my colleague has just said, it is my recollection that in the matter of the anthracite coal trust, the trusteeship was a part of the decree of the court. I may be wrong about that, but I think there was a very elaborate decree in that matter.

Mr. EASTMAN. I have no doubt. I was thinking of the New Haven.

Mr. BECK. I know, but I was giving an illustration. That is my recollection, although it may be at fault. But, leaving that suggestion aside, I should like to ask you this question.

I had not the privilege and pleasure of hearing your argument yesterday, because I was all day in the Supreme Court. But I did want to ask you this one question. I suppose, following the intention of the acting chairman's remark, that we are all opposed, unless it is strictly necessary, to doing anything in the nature of an ex post facto law—I mean the divestiture of the ownerhsip of stock acquired quite lawfully and then by governmental decree requiring it be sold, and therefore, if it can be avoided, we would like to avoid it—the acting chairman's questions were directed to that end. Right in line of that inquiry, I am taking a sample illustration. What does the preliminary and the final plan for the consolidation of railroads do to the New Haven and Boston & Maine?

Mr. EASTMAN. The plan which was adopted by the commission provides for separate Boston & Maine and New Haven systems. In the case of the New Haven, my recollection is that the system is to include the New York, Ontario & Western, which is already under the control of the New Haven, and is also to include the Lehigh & Hudson and the Lehigh and New England railroads. In the case of the Boston & Maine, my recollection is that that system is to include the Maine Central and the Bangor & Aroostook, and also the Delaware & Hudson and part of the Rutland. I am just speaking from memory on that, and may not be absolutely correct.

Mr. BECK. That was preliminary to this question. As I recall the testimony, both the Pennsylvania Co. and Pennroad together held approximately 20 per cent of the New Haven stock.

Mr. EASTMAN. About 22 per cent, I think.

Mr. BECK. I say, about. I did not mean exactly.

How would the holding of 20 per cent of the New Haven stock by these two corporations practically interfere with any plan of consolidation of railroads?

Mr. EASTMAN. Well, yesterday when you were not here, I quoted from the report of the New England Governors' Committee, a committee which was appointed by the various New England governors, including representatives from the five New England States—five eminent men from each of the States, and they examined very carefully into the situation. The conclusion of the majority with respect to the present ownership of the Pennsylvania in the stocks of the New England railroads was as follows:

> In view of our conclusion that extension of trunk line control is not advisable, it becomes necessary to examine the present position of the Pennsylvania Railroad in relation to the New Haven and the Boston & Maine. In our opinion, the present degree of ownership of the Pennsylvania in both of these railroads is excessive, and gives the Pennsylvania an opportunity to exercise practical working control at any time it should wish to do so. In reaching this conclusion we are impressed with the fact that the Pennroad corporation is in the final analysis an agency of the Pennsylvania Railroad and for all practical purposes must be so considered.

Then a little later on they said:

> It has been stated that the Pennsylvania has not interferred with the management of either the New Haven or the Boston & Maine, but it must be remembered that its present ownership gives the Pennsylvania a controlling voice in the policies of both railroads whenever it is for its interest to exercise it. The present policy of moderation may well reflect the enlightenment of General Atterbury, but there is no assurance that those who follow him will be as statesmanlike in their attitude. We believe that the disadvantages to New England of trunk line control of the railroads which have already been enumerated apply with force against the present ownership of the New Haven and Boston & Maine by the Pennsylvania Railroad, and that it is in the interests of New England that this ownership should be reduced to a percentage which would effectively prevent the Pennsylvania from exercising a controlling voice in either of these railroads.

In other words, the conclusion of that committee was that the Pennsylvania has so large a stock interest, direct or indirect, in those two railroads, that it could at its discretion exercise a working control over them, and believing that the trunk lines should not control the New England railroads, the committee felt it desirable in the public interest that those holdings by the Pennsylvania Railroad should be reduced.

Mr. BECK. That is a very interesting expression of opinion—I mean, the opinion of the governors' committee in question. But do you know of any case in the Supreme Court in which it has been held that 22 per cent can be regarded as control of a corporation, especially where the other 80 per cent is largely scattered among stockholders in New England?

Mr. EASTMAN. I do not know of any case in the Supreme Court, in direct answer to your question. In fact, I do not know that that question has ever been considered by the Supreme Court. My own opinion would be that there would be more likelihood that such a

holding would give working control, if the rest of the stock were widely scattered in the hands of small owners, as you intimate it is.

Mr. BECK. Yes; but in case the Pennsylvania Railroad, with its 22 per cent—assuming that the Pennsylvania Railroad is the same as these other two corporations—in the event of any struggle for the control of that road in a determination of its policies, it quite ignores the fact that the management of that road in securing proxies ought to have no difficulty in overcoming 22 per cent out of a hundred per cent.

Mr. EASTMAN. Well, I can hardly believe myself that the Pennsylvania would have invested the very large amount of money that it has invested in the stocks of those railroads merely for purposes of pure investment. It must have felt that it would secure some influence in the affairs of the railroads through such a stock ownership.

Mr. BECK. Influence is one thing and control is another. I think we will agree to that.

Mr. EASTMAN. Yes.

Mr. BECK. But my question is more specifically directed to the fact that after all, what we are considering is not the question of restraint of competition, which could not appear in this case, because the New Haven and the Boston & Maine are in no sense competitors of the Pennsylvania Railroad system. The question is, however, how far it would affect any plans for consolidation of your commission to have the railroads own 22 per cent in a noncompetitive road through a holding company.

Mr. EASTMAN. If I may start with the premise to your question, I referred yesterday to an opinion which was given to this New England Governors' Committee by its legal adviser, Mr. Bentley W. Warren, of Boston. Mr. Warren expressed an opinion with respect to the Clayton Act which was new to me, but most interesting, and it was to the effect that an acquisition of a connecting railroad might result in a restraint of trade.

For example, here you have the New Haven Railroad which, if it is not controlled by one of the trunk lines which connect with it, is in a position to deal freely with all these connecting and competing trunk lines. The domination or control of that railroad by one of those trunk lines might well result in restraint of the competition of those connecting trunk lines with each other. That is the legal theory which was expounded by Mr. Warren in that opinion.

So I do not think it follows necessarily that the combination of end-to-end railroads involves any question of the suppression of competition.

I believe that a holding as large as 22 per cent in the stock of a road whose shares are so widely held as are the New Haven's, would give the holder of that 22 per cent an opportunity either to dominate or to exercise a very considerable influence upon its policies; and furthermore that holding may be expanded at any time in the same manner in which it has been secured.

Mr. BECK. So far as restraint of trade is concerned, of course, if the holdings of the Pennsylvania Railroad or any affiliated organizations represent a restraint of competitive conditions, the Department of Justice can at all times go into a court of justice and thereupon compel the divestiture of that stock under existing law. No new law is necessary to do that. So the restraint of trade feature drops out of it,

and what we are considering now is whether or not this bill in respect to its divestiture clause really obstructs and embarrasses the Interstate Commerce Commission in formulating a plan for consolidation of railroads. I therefore renew my question: How far or to what extent would the Interstate Commerce Commission be prevented from formulating a final plan of consolidation merely by the fact that the Pennsylvania Railroad held 22 per cent—I am assuming, for the purposes of the question, that it is the Pennsylvania Railroad—of a noncompetitive road?

Mr. EASTMAN. Well, I do not think it would prevent the commission from formulating a plan. In fact, it has already formulated a plan. But the intent of that plan is that the New England railroads should be independent systems, not under the control or influence of any of the connecting trunk lines.

Now, under this bill, the commission would have authority to consider the situation presented by the holding of the stock of the New Haven and the Boston & Maine by the Pennsylvania or its adjunct, the Pennroad Corporation. I ought not to undertake to speculate as to what the commission might do with respect to that situation. It would depend upon what facts could be shown at that time. If it could be shown that the holding of that stock was not influencing the management of the New Haven or the Boston & Maine in any way, then there would be no ground for the commission to act, as I see it. There would be ground to act, however, if the contrary were shown.

Mr. BECK. Well, the commission could then, in formulating its plan of consolidation, provide that its consent was only given upon the condition that any given percentage of stock of the New Haven controlled by any other carrier should not be voted to influence the control of that organization.

Mr. EASTMAN. Of course, the plan of the commission is merely a plan and does not require any action by any of the railroads thereunder. After the plan is made, then the railroads may come before the commission and ask for authority to carry out that plan in whole or in part. And in connection with the grant of authority to do certain things under that plan, it is conceivable that the commission might attach some condition such as you suggest. That would depend largely, it seems to me, upon whether or not a railroad would come before the commission asking for authority of such a character that such a condition would be germane in some way.

Mr. BECK. But they can not consolidate without the permission of the commission under existing law.

Mr. EASTMAN. Can not consolidate; no.

Mr. BECK. Therefore, the Interstate Commerce Commission, under existing law, could, if it thought it appropriate, without any of this divestiture clause, simply say, "We will give consent to a given consolidation if the Pennsylvania Railroad desires, provided it will not vote the stock which it is now holding in the New Haven Railroad."

Mr. EASTMAN. My recollection is that under the 4-system plan there is not much that is given to the Pennsylvania that it does not already have. It is already the largest system in eastern territory. The plan gives it the Wabash. It already has the Wabash, illegally, we think. Nevertheless, it has the Wabash. There may be some small incidental roads in connection with the plan where it might

be necessary for the Pennsylvania to come before the commission and ask for approval of certain things. But, take the case of the Wabash: Suppose the Pennsylvania came before the commission and asked for authority to acquire control of the Wabash. That is situated away out in the central part of the country. Could the commission say that it was germane to attach to such authority a condition that the Pennsylvania Railroad should do certain things with respect to the New England railroads, which are located in quite another part of the country?

That authority to attach conditions to the approval of consolidations or acquisitions of control is still subject to doubt. It has not been tested out in the courts as yet.

Mr. BECK. Well, the only purpose of the questions that I have asked you was to see the practical need of this. I do not want to prolong the inquiry. As I say, the purpose is to show the practical need of anything so drastic as the divestiture of stock lawfully acquired as early as 1920.

I remember it was said when the bill was passed compelling the divestiture of all the coal properties by the railroads, that the situation was so appalling to the values of investors, that the Attorney General did what was a wise thing, but an unlawful thing. He just simply suspended the operation of the law until it could be tested in the Supreme Court, because the throwing of all those coal holdings upon the market would have led at that time to a terrific crash of security values. In that way the matter was postponed until the Supreme Court eased the situation by the decision in the Delaware & Hudson case which, of course, you know.

Some of us possibly fear that we do not want to have, especially in the precarious conditions of security markets to-day, the possibility of such a shadow upon the market, as giving the commission the right which they would probably exercise very wisely and very conservatively, of throwing vast holdings of stock upon the market, when it could not possibly absorb them.

While your proposed bill does say something about the power—not necessarily the duty, but the power—of the commission to hold these stocks until there was a normal market price, I am wondering just exactly what is a normal market price. May I ask in that connection what you think the normal market price of Pennsylvania is?

Mr. EASTMAN. I do not know.

Mr. BECK. None of us know.

Mr. EASTMAN. I do not think that the present price is normal.

Mr. BECK. No. That is certainly abnormal. Nevertheless, who can say what is the normal price ofthe stock? I suppose you could say that during the last 10 years it has had some good years and some bad years and that the average would be regarded as normal. But is it not a tremendous power to vest in the Interstate Commerce Commission, wisely or unwisely to market vast holdings running into the hundreds of millions of dollars, that were lawfully acquired, unless there is some imperious necessity for doing it?

And the purpose of my questions was to indicate to you that under existing law the commission practically controls this question of consolidation, because the railroads can do nothing without their consent, and if there be this menace to the integrity or the independence of the New Haven system of a holding of 20 per cent by a non-

competitve carrier, any favor that the Pennsylvania Railroad may ask in connection with consolidation can, as the whole thing is part of a great transcontinental plan, be held up upon the condition that they either sell that stock in their own way and in their own time, or at least trustee the stock or agree not to vote it.

Mr. EASTMAN. Well, I would not agree with you that the commission has complete control over the situation, by any means, and I think what has been done by these holding companies is very clear proof that it has not complete control over the situation.

When it comes to attaching conditions such as you suggest, I imagine that such provisions would be contested in court and I should think there might be grounds for contesting them, unless it could be shown clearly that such a condition was strictly germane to the particular thing which it was being sought to accomplish.

Mr. BECK. This is my last question.

I do not think the Department of Justice in any court of justice could establish that 20 per cent was control of a corporation, much less control of a noncompetitive system, that it was any violation of the Sherman antitrust law. But my impression is—I am only speaking from memory—that in the Standard Oil and Tobacco cases the Supreme Court did indicate that 40 per cent and over could be regarded from a practical standpoint as control. I do not think any court would say that 20 per cent was.

Mr. EASTMAN. I call your attention to the fact that these gentlemen upon this New England governor's committee who reached the conclusion that the present holdings of the Pennsylvania in the New England railroads gave the Pennsylvania practical working control at any time it wishes to exercise control are not theoretical men. They are eminent business or professional men, practical men of affairs.

Mr. BECK. You remember that the president of that railroad also said the Pennsylvania Railroad had never sought in any way whatever to interfere with the New Haven road. And can you give one instance to this committee where the Pennsylvania Railroad has ever interfered with the New Haven Railroad by reason of its stock ownership?

Mr. EASTMAN. I have not had the opportunity to study the evidence upon that question. I understand that in the hearings on the 4-system plan, a good deal of evidence with regard to that very matter was presented. I did not hear it and have not, as yet, read it.

Mr. BECK. I am very much obliged to you, Mr. Eastman.

Mr. MAPES. Mr. Chairman, I should like to ask a few questions.

You partly answered one question I had in mind, Mr. Eastman, in an answer to one of Mr. Huddleston's questions. You said that you did not think that the commission would act very generally under this divestiture provision and in answer to one of Mr. Beck's questions you said that in the 4-system plan it was not proposed to give the Pennsylvania system much that it had not already acquired through its holding company. Is that correct?

Mr. EASTMAN. That is my recollection.

Mr. MAPES. When you made the statement that you did to Mr. Huddleston, I wondered, if you thought it proper to do so, if you could give us some idea as to how much the commission would be called upon to exercise its authority under this divestiture provision, in order to carry out the 4-system plan.

Mr. EASTMAN. The 4-system plan?

Mr. MAPES. Yes. Are the issues well enough drawn so that you can give us some idea as to how much interference there would be with the investments of these holding companies in order to carry out that plan.

Mr. EASTMAN. The 4-system plan simply relates to eastern territory, eliminating New England. These holdings of the Pennsylvania in New England railroads are, of course, not directly involved in the 4-system plan, and the holding of the Allegheny Corporation in the Missouri Pacific is not directly involved in the 4-system plan. So far as that plan itself is concerned, I do not know of any occasion for exercising this divestment provision if the commission should approve that plan. There may be. I am not very familiar with that plan. I have not heard the evidence in regard to it, the various contentions which are made by the parties, and I have not heard the arguments as yet. And, of course, the situation might be quite different if the plan were not approved.

Mr. MAPES. Then, as I understand you, as far as your information goes, the passage of this legislation or the failure to pass it, would not have much effect upon the 4-system plan.

Mr. EASTMAN. So far as I know, but I would not attach a great deal of importance to that answer, because I am not fully informed.

Mr. MAPES. I do not know that you could give me any more definite answer than you have, but I was wondering how much of an interference with present investments the passage of this bill will possibly make.

Mr. EASTMAN. My personal opinion is that there would be no great amount of interference. I think the question might well arise with respect to the holdings of the Pennsylvania in the stock of the New England railroads. It might also arise with respect to the holdings of the Allegheny Corporation in the Missouri Pacific, and there are other situations where it might arise. But I should not suppose that there would be any necessity for any widespread exercise of the power.

Mr. MAPES. You say the question might perhaps arise in those cases which you have mentioned. I take it from that that you are not at all certain that the question would necessarily arise even in those cases; is that true?

Mr. EASTMAN. Well, I hesitate to express a categorical opinion on those matters, because if the bill should go through, they are matters which I should be under the duty of considering judicially thereafter.

Mr. MAPES. I appreciate your position and I would not want you to express any opinion which would be considered at all binding. I only wanted to get some idea as to how far it might be reasonably supposed that this was going to interfere with investments.

Mr. EASTMAN. My opinion is that there would be no widespread exercise of this power. As I say, I think it is very important, if the railroads of the country are going to be combined into a limited number of systems, that those systems should be absolutely independent of each other, and should be managed without regard to the other systems. The power in question is directed toward that end and would, I believe, be very helpful.

Mr. MAPES. It is your judgment, then, that that particular argument against this bill might be easily overemphasized?

Mr. EASTMAN. The argument as to the effect upon the market and so on?

Mr. MAPES. Yes.

Mr. EASTMAN. Yes, I do.

Mr. GARBER. Mr. Chairman, I would like to ask the witness a question on another matter, but it goes to the bill and to the matter of consolidation. As I recall, the transportation act of 1920 required the adoption of a plan. After investigating the adoption of a plan for about three years, the commission reported to Congress that the adoption of an arbitrary plan was unworkable. Is not that correct, substantially?

Mr. EASTMAN. Yes. The commission recommended to Congress that it be relieved from the duty of adopting a complete plan of consolidation. I noticed in reading the transcript of these hearings that Congressman Hoch made the statement that the commission had reported to Congress that it was impossible to prepare such a plan. That is not my understanding. We never said it could not be done. What we did say was that in our opinion it was undesirable to prepare such a plan.

Mr. GARBER. The commission continued such a report to Congress for a period of about five years, with the hopes that Congress would take some action?

Mr. EASTMAN. Yes. I think the delay on the part of the commission was caused by the fact that during all of that period bills were pending and being actively considered by the congressional committees.

Mr. GARBER. And the committee here refused to report out any bill?

Mr. EASTMAN. I have forgotten as to that. I thought a bill was reported out.

Mr. GARBER. At least, Congress declined to take any action.

Mr. EASTMANN. We finally went ahead and adopted our plan.

Mr. GARBER. Then in 1929 you went ahead and adopted a plan of consolidation. What were the additional causes intervening that caused the commission to finally reach the conclusion that a plan of consolidation, the adoption of an arbitrary plan of consolidation, would become workable or advisable?

Mr. EASTMAN. Well, the commission was under the duty, under the law, of preparing and adopting such a plan. Now, it delayed performing that duty after recommending to Congress that it be relieved from the duty. But when at length it found that it was not to be relieved, it felt that it could no longer properly delay, and it went ahead and did what the law told it to do.

Mr. GARBER. Well, to what extent does this plan adopted take in all the roads? Does it take care of the short lines?

Mr. EASTMAN. Yes. They are all assigned in the plan.

Mr. GARBER. It takes care of everything in the way of bringing all the various lines into the respective systems?

Mr. EASTMAN. Yes. I think they are all taken care of, with the possible exception of some of the electric lines where it is doubtful whether they are covered by the statute.

Mr. GARBER. To what extent and in what way is this compulsory plan of consolidation going to affect the changes in the organization, if any, or in the administration by the commission?

Mr. EASTMAN. There is no compulsory plan of consolidation, Judge.

Mr. GARBER. Will the plan become compulsory upon the adoption of this pending bill?

Mr. EASTMAN. No, sir; not in my opinion.

Mr. GARBER. It is only conditional that if consolidations are effected, they must be according to the plan adopted?

Mr. EASTMAN. Correct.

Mr. GARBER. And as yet there has not been any consolidation effected?

Mr. EASTMAN. Well, there have been many acquisitions of control. There have been no technical consolidations.

Mr. GARBER. No consolidations; they have just simply effected unifications?

Mr. EASTMAN. There have been acquisitions of control, where one railroad has been permitted to acquire stock control of another. There have been leases approved and there have been some purchases of property made under the provisions of paragraph 18 of section 1.

Mr. GARBER. What, if any, will be the beneficial results to the consuming public; that is, the transportation consuming public, in the effectuation of consolidation under this plan?

Mr. EASTMAN. The thought behind the plan of consolidation, and, of course, that is Congress's plan—the thought behind it, as I have always understood it, is that by consolidating the roads in that way, certain economies in operation would be secured; and, furthermore, that certain of the weaker lines would be eliminated and brought under the control of stronger railroads, better able to take care of their necessities.

Mr. GARBER. When consolidation was first proposed, the economies were used as the argument in support of the plan, is that right?

Mr. EASTMAN. Well——

Mr. GARBER. The main argument for consolidation was the effectuation of economies.

Mr. EASTMAN. I think that Senator Cummins was one of the chief proponents of the consolidation plan and it is my impression that the thing he always accentuated was the elimination of the so-called weak sisters; that he wanted consolidations which would eliminate those disturbing factors in the situation and bring those roads under the domination or guardianship of stronger systems.

Mr. GARBER. There were two arguments advanced for consolidation; one to take care of the weaker roads, as you say, which was the paramount consideration of Senator Cummins, and the other was the matter of economies. Subsequent studies and investigations have caused the abandonment of the economy argument to a great extent, have they not?

Mr. EASTMAN. No; I would not think so. I think there is a rather general feeling that the economies have been exaggerated, the possibility of economy through consolidation.

Mr. GARBER. But the big value of consolidation is the building up of systems that will have a greater financial credit, is it not?

Mr. EASTMAN. That is one of the reasons.

Mr. GARBER. Stronger systems, more credit.

Mr. EASTMAN. At least, to eliminate some of the roads which have a weaker credit.

Mr. GARBER. Yes. Now, then, after your study and investigation, do you believe that the arbitrary plan of consolidation adopted is going to result in a practical solution of all the problems that are generally accredited to consolidation?

Mr. EASTMAN. Well, so far as my personal feeling is concerned, I have always believed that consolidations produce beneficial results in many instances, but that the beneficial results are apt to be exaggerated, and I have much doubt as to the advantage which would be gained by the creation of very large systems. The terms and conditions under which consolidations are brought about are also a matter of very great importance.

Mr. GARBER. That is all.

Mr. CROSSER. Mr. Commissioner, almost the one concern that seems to have been expressed was that consolidations would be prevented if these holding companies were allowed to continue unrestrained. Is it not just as important if not more, that independent lines remain independent?

Mr. EASTMAN. Yes. That is my concern with respect to this bill. Not that holding companies tend to prevent consolidations, but that they bring about combinations of railroads without any public supervision whatsoever.

Mr. CROSSER. That thought has been going through my mind.

Now, one more question as to another matter. Do you think that by giving the commission power to order that stock held by a holding company be not voted, that that would effectuate in itself the purpose that you have in mind?

Mr. EASTMAN. Well, I would prefer, as I think I indicated to Chairman Huddleston, a provision for a trusteeship rather than a mere prevention of the exercise of voting power. It seems to me desirable that somebody should vote that stock and the trustee arrangement is a well tried and tested arrangement.

Mr. CROSSER. I think it would be freer from legal difficulty not to have a trusteeship, but it would also remove some of the objections that there are to putting it in the control of a trustee. For instance, some might agree to the desirability of not allowing stock to be voted at all, whereas they might fear the same consequences from control of the stock by trustees as by the holding company. I just wondered whether or not to all practical purposes if such stock were denied the right to vote the purpose of the I. C. C. would be accomplished?

Mr. EASTMAN. My opinion is that if you eliminate the divestment feature of this bill entirely, you still have legislation which ought to be enacted. I would much prefer to see the divestment provision made part of it. Rather than eliminate it entirely, I would prefer to have such an arrangement for trusteeing the stock as Acting Chairman Huddleston has suggested, and if you do not approve of that, I would prefer to see the plan which you suggest for eliminating the voting power of the stock rather than not to see that provision included at all.

Mr. CROSSER. I have been wondering whether or not it would be possible to give the commission control of the stock and allow it to vote it when it is necessary to prohibit holding company from voting it.

Mr. EASTMAN. If you allow the commission to vote the stock, we get pretty close to Government ownership.

Mr. HUDDLESTON. Mr. Eastman, if there are no further questions, the committee is very much obliged to you.

Mr. HUDDLESTON. Gentlemen of the committee, Doctor Splawn was to have been here, but he is sick abed. He has a statement which is in the custody of Mr. Perley. If the committee has no objection, we will hear it.

Mr. PERLEY. Mr. Chairman, this statement is fairly long. I do not know whether you want me to read the quotations from court opinions or not.

Mr. HUDDLESTON. If the committee agrees with the idea, I suggest we hear Mr. Perley as long as the members of the committee desire, and then we can print the balance of the statement in the hearings.

Mr. BULWINKLE. Mr. Chairman, we could not, of course, examine Mr. Perley on Doctor Splawn's statement. Why not just have the statement inserted in the record, to expedite matters?

Mr. HUDDLESTON. Mr. Perley, you may insert Doctor Splawn's statement in the record.

(The statement above referred to is as follows:)

STATEMENT OF WALTER M. W. SPLAWN, SPECIAL COUNSEL FOR THE INTERSTATE AND FOREIGN COMMERCE COMMITTEE, UNDER HOUSE RESOLUTION 114

It is my purpose to discuss the questions on constitutionality which have been raised as to the bill H. R. 9059.

Before taking up these questions, however, I would like to make a statement with respect to the testimony of former Commissioner Potter in which he referred to a statement which I made when I appeared before the committee on the question as to whether paragraph (2) of section 5 has the effect of prohibiting one carrier from acquiring control of another without the approval of the commission, and as to whether Congress intended that the grouping of railroads should be in the hands of the commission. Mr. Potter made the following statement:

> And that brings me to the misunderstanding Doctor Splawn has. Doctor Splawn in his statement here said that the original division's decision in the Pittsburgh & West Virginia case from that day to this has given the commission's interpretation as to the intent of this law * * *.

Mr. Potter then went on to give his views on the subject, contending that the decision referred to, which appears in 70 I. C. C. 682, did not represent the final position of the commission on this question.

I still stand on the statement that I previously made, and desire to say that the commission through its division 4 in the case in question declared that in its opinion the intent of Congress was that control over the situations should be in the hands of the commission so that consolidation or other union of interests might not be effected without the consent of the commission. Further, I desire to say that the application of the Pittsburgh & West Virginia Railway Co. for permission to issue capital stock was denied on the ground that the

purpose of requesting such permission was to enable it to acquire a control which it could not acquire unless it got the permission of the commission under paragraph (2) of section 5; and that the commission entered its order denying the application. When the matter was opened for rehearing in security application of Pittsburgh & West Virginia Railway (76 I. C. C. 663), the commission did not reverse the former opinion. The order in 70 I. C. C. 685 reads as follows:

> A hearing in this proceeding and investigation of the matters and things involved therein having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereof, which report is hereby referred to and made a part hereof:
> It is ordered, That the said application be, and it is hereby, denied (p. 689).

You will note that the report of the commission in which it construed the statute and used the language—

> In our opinion it was the intent of Congress that a particular control over the situations should be in our hands * * * so that consolidations or other union of interests might not be affected without our consent—

was made a part of the above order. An effort was made to have that order set aside but without success. The order still stands against the railroad company and to this day contains as a part of the order the report and the langauge to which reference has been made. That is true in spite of the effort of Mr. Potter as a commissioner to get the commission to reconsider the very language to which I have referred. In spite of Commissioner Potter's earnest protest the commission again denied the application of the Pittsburgh & West Virginia, but its original order stands, and that order contains the position which I quoted.

I now come to the constitutional points which have been raised and concerning some of which Judge Beck asked me to comment at the close of my statement on February 18th.

I might say that Mr. Perley, of the office of the legislative counsel, has collaborated with me in examining the cases and in studying the legal problems involved, and is in agreement with me as to the conclusions of law which I shall state. This concurrence does not imply any position on questions of policy by him or any one else in the office of the legislative counsel.

First, I would like to discuss the matter from the standpoint that the proposed legislation is constitutional, because it deals in a valid way with a subject matter as to which Congress may properly legislate, and, second, I would like to refer to the arguments that have been advanced to support the contentions that the bill goes beyond the power of Congress.

On the general question of the power of Congress, it is first proper to inquire as to the purpose of the bill. This phase of the matter has already been presented to the committee, but since the constitutionality of the bill depends largely on whether the purpose is one which Congress may validly attempt to accomplish, it is necessary to discuss it here. From this point of view it may be stated, briefly, that the object of the bill is to supplement the provisions of section 5 of the interstate commerce act, by recognizing the fact that a plan for the consolidation of railroads has been formulated as required by the provisions of that section, and by adopting appropriate measures calculated to prevent consolidations, unifications, and acquisitions

and holdings of control of railroads from being effectuated and maintained in such manner and under such circumstances as will defeat the consolidation plan which is the basis of the public policy established by Congress with respect to railroad consolidation.

That this is a purpose well within the power of Congress would seem clear.

I would like to refer to some of the many decisions of the Supreme Court which could be cited with respect to the interstate commerce power of Congress.

Early cases established that the interstate commerce clause gives Congress complete power in the regulation of interstate commerce, limited only by other provisions of the Constitution itself. (Gibbons *v.* Ogden (1824), 9 Wheat. 1; Brown *v.* Maryland (1827), 12 Wheat. 419.)

The power to regulate is the power to "aid and encourage," to "foster and protect," and to "control and restrain." (Gloucester Ferry Co. *v.* Pennsylvania (1885), 114 U. S. 196; Houston & Texas Ry. Co. *v.* United States (1914), 234 U. S. 342.)

The case of California *v.* Pacific Railroad Co. (1888) 127 U. S. 1, indicates the court's view in 1888, with respect to the power as it relates particularly to railroads. In that case the court denied the power of the State of California to make assessments against franchises granted to a railroad under Federal law. The court said, after referring to certain contentions which had been made as to the limits of the commerce power with respect to interstate railroads:

> * * * in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject (p. 39).

Dealing with the question as it is presented in modern times, the Supreme Court in the Dayton-Goose Creek case (1924), 263 U. S. 456, which involved the validity of the "recapture" provisions of the interstate commerce act, outlined the power of Congress in the following sweeping terms:

> * * * it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. (The Daniel Ball, 10 Wall. 557, 564; County of Mobile *v.* Kimball, 102 U. S. 691, 696, 697; California *v.* Pacific R. R. Co., 127 U. S. 1, 39; Wilson *v.* Shaw, 204 U. S. 24, 33; Second Employers' Liability Cases, 223 U. S. 1, 47; Luxton *v.* North River Bridge Co., 153 U. S. 525, 529.)
> * * * If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service (pp 478–479).

If Congress may foster, protect, and control interstate commerce, with appropriate regard both to the railroads and to the public at large, and promote its growth and insure its safety, and the authorities referred to clearly show that it can, it seems certain that the object of the proposed legislation, namely, the protection and furtherance of the public policy as to interstate railroad consolidations,

unifications, and acquisitions of control, is within the constitutional power of Congress.

It has been admitted by critics of the bill that Congress probably has power to provide for compulsory consolidation of railroads. This presupposes that such consolidation would have to conform to whatever plan and whatever reasonable conditions Congress might provide for. The present bill stops far short of compulsory consolidation, and it surely can not be said that it is any weaker constitutionally because Congress does not propose to exert the full power that it could exert.

Before discussing the particular points raised as to the constitutionality of the bill, I would like to make the general observation that, if it is conceded that the purpose of the bill is one to which the interstate commerce power may extend, and I think, for the reasons heretofore stated, that this must be conceded, then if the means employed by Congress are reasonably necessary and appropriate to accomplish that purpose, there is no remaining ground upon which to base a claim of unconstitutionality.

It is well recognized that Congress has large discretion in selecting the means for carrying out its powers.

* * * Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. (McCulloch *v.* Maryland (1819), 4 Wheat. 316.)

I think that all the contentions that have been made as to unconstitutionality relate to the means which have been employed to effectuate the purpose of the bill.

I believe it is accurate to say that, with one exception, these arguments are all directed at the proposed paragraph (6), which would authorize the commission to require divestment of stock in order to prevent the defeat of the consolidation plan.

The one exception to which I refer is the suggestion, not at all strongly urged, that the provisions relating to future consolidations, mergers, and acquisitions of control, as well as the provisions of paragraph (6) relating to divestiture, many be unconstitutional as delegating legislative power. As I understood the point, it was that Congress could not give the commission power to say whether it is in the public interest for stock in a railroad to be owned by a particular person or for railroads to be acquired or consolidated. Since the public interest is not mentioned in the divestiture provision, paragraph (6), the argument has no application to that provision.

It is true that the public interest is one of the standards laid down in the proposed paragraph (4) to guide the commission in determining when to approve consolidations, mergers, and acquisitions of control. In order to support the contention that there is an unconstitutional delegation of legislative power in this provision it must be shown that this standard, namely, the public interest, is too indefinite. No authority has been cited to show this. I believe that an examination of the cases will show that no act of Congress has ever been held to contain an unconstitutional delegation of power to an executive or administrative agency. Some of the principal cases in this field of the law are as follows: Field *v.* Clark (1892), 143 U. S. 649; Buttfield *v.* Stranahan (1904), 192 U. S. 470; Mutual Film Corporation *v.* Ohio Industrial Commission (1915), 236 U. S. 230; Hampton *v.* United States (1928), 276 U. S. 394.

As a matter of fact, the public interest is used as a standard in paragraphs (2) and (6) of section 5 of the interstate commerce act, which it is here proposed to amend, and the provision of the bill under discussion is actually an expansion and enlargement of those very provisions of the act.

I made reference to the test of the public interest, as applied by the commission in many applications under paragraph (2) of section 5, in my statement of February 17, on page 13 of this record.

Another somewhat related point has been raised, that the bill would be invalid as vesting judicial functions in an administrative agency. No authorities were cited to support this point, I believe. I do not think it can be well supported.

Congress may clothe an administrative agency with functions of a judicial or at least a quasi-judicial character, if the exercise of these functions is incidental to the exercise of its administrative powers. (See Louisville & Nashville R. Co. *v.* Garrett (1913), 231 U. S. 298; Ex parte Bakelite Corporation (1929), 279 U. S. 438; Crowell *v.* Benson (1932), — U. S. —, 52 S. Ct. 285.)

The question seems to be the same here as under the Clayton Act, and the validity of that act is unquestioned.

The bill provides for notice and hearing before the commission makes its order, and the orders of the commission are to be enforced only through proceedings in the district courts of the United States. No authority is given to the commission to determine finally any question which may be finally determined only by a court.

The remaining points on constitutionality relate, as I have stated, to paragraph (6), the provision for divestment of stock.

There has been much confusion introduced into the discussion of this paragraph by reason of failure to recognize how closely it is related to the consolidation plan. It has been contended that the bill should be called "a bill to regulate the ownership of stock in railroads," implying that it contains provisions for arbitrary regulation of stock ownership, and ignoring the fact that the respect in which stock ownership in railroads is sought to be controlled is exceedingly narrow and closely tied up with the basic purpose of preventing the defeat of the consolidation plan. It is further argued that the logical result of doing what Congress proposes to do in this bill would be to permit Congress to say who may own oil wells and who may engage in other private enterprises. Also, it has been urged that Congress has no power to determine, or to give to the Interstate Commerce Commission the power to determine, whether it is in the public interest for an individual or a corporation not a railroad, to own the stock of a railroad.

These arguments have no application to the bill, because it contains no such sweeping and arbitrary provisions. Therefore, much if not all of their force is lost Actually, the bill provides for divestment only in cases where the holding of stock is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of the consolidation plan or impairing the independence of the systems provided for in such plan, by reason of subjecting one carrier to the control, domination, or influence of another carrier.

Congress has power to require divestment of stock in order to effectuate a valid policy. It has been done with the approval of the courts under the Clayton Act. (See Standard Oil Co. *v.* United States

(1911), 221 U. S. 1; United States *v.* American Tobacco Co. (1911), 221 U. S. 106.) Under that act the requirement of divestment is to enforce the prohibition against creating monopolies and restraining competition, while in this case the requirement is proposed to be used for what would appear to be the equally valid purpose of preventing the defeat of the congressional policy as to railroad consolidation. I believe it has been argued, in substance, that this is different from the Clayton Act because in that act the divestment was only required of stock acquired after the act was passed. I believe that what I shall say later, with respect to the attitude of the Supreme Court with respect to legislation adversely affecting previously existing property rights, will show that this difference is not important.

The provision intended to permit stock owners to realize the fair normal market value of their stock has been criticized. While it is true that there may be differences of opinion as to what the fair normal market value is, objection to this provision could not, it would seem, be made on any constitutional ground. It would hardly seem that the bill is any the less valid by reason of the fact that it attempts in this way to protect the owners of stock from loss.

It has been suggested that paragraph (6) would be subject to the constitutional prohibition against ex post facto laws. However, it would seem clear that the two elements necessary to make a law ex post facto are here absent. Ex post facto laws are those which apply new criminal punishments to acts done in the past. (Calder *v.* Bull (1798), 3 Dall. 336; Johannessen *v.* United States (1912), 225 U. S. 227.) The provision in question does not apply to any acts done in the past. It does not make the act of acquiring stock accomplished in the past unlawful. It provides that stock shall not be held in the future in such a way as to defeat the policy of Congress. It thus applies to the future, not the past. With respect to the question of criminal punishment, which must exist if the ex post facto prohibition is to apply, the provision is unobjectionable, for it is regulatory, rather than penal, in character.

The paragraph is objected to as being retroactive. For the reason that it does not deal with the past act of acquiring stock, the paragraph can not logically be considered to be retroactive. However, even if it is so considered, the retroactive feature is not in itself ground for a holding of unconstitutionality. It is true that it affects a right acquired in the past, but it is perfectly proper to do this in furtherance of a valid legislative policy.

Congress has in the past, by legislation which has been held valid, cut down or destroyed rights which had been lawfully acquired prior to the passage of such legislation.

For example, in Louisville & Nashville Railroad Co. *v.* Mottley (1911) (219 U. S. 467), an act abolishing free railroad passes was held valid even as to passes issued on good consideration prior to the enactment of the act. In Addyston Pipe & Steel Co. *v.* United States (1899) (175 U. S. 211), the Sherman Act was held to be valid even though it struck down contracts which had been made before the passage of the act. By virtue of the eighteenth amendment and enforcement acts liquor lawfully manufactured was converted from an asset into a liability in the manufacturer's hands, and the court held that the due process clause was not thereby violated. (Jacob

Ruppert *v.* Caffey (1920) (251 U. S. 264); James Everard's Breweries *v.* Dale (1924) (265 U. S. 545).

Other instances of retroactive laws upheld by the Supreme Court are found in certain State statutes. Such statutes, of course, must conform to the ex post facto and due process tests contained in the Federal Constitution. A Georgia citizen lawfully acquired liquor in 1905. The Georgia Legislature in 1917 outlawed possession of liquor. Seizure of the liquor was held not improper though no compensation was given. (Samuels *v.* McCurdy (1925), 267 U. S. 188.) Where a railroad built a proper embankment it was nevertheless accountable for maintaining an improper embankment when the Missouri Legislature required such embankments to be constructed in a different manner. (Chicago & Alton R. R. Co. *v.* Tranberger (1915), 238 U. S. 67.) These cases, though not involving Federal statutes, are nevertheless important, for due process is the same requirement whether the clause from the fifth or that from the fourteenth amendment is applicable.

I now come to the point which has been more seriously argued than any other, namely, that ownership of stock does not constitute interstate commerce, and that the power of Congress can only be exercised with respect to a subject matter which is in interstate commerce or bears a substantial relation to interstate commerce. It is further objected that the paragraph applies to corporations and persons not instrumentalities of interstate commerce. I do not think it can be soundly argued that the holding of stock, no matter by whom, in such a way as to defeat the plan which is part of the public policy as to consolidation of interstate railroads, bears no substantial relation to interstate commerce.

The case of Northern Securities Co. *v.* United States (1904) (193 U. S. 197), has, rather surprisingly it would seem, been cited as the principal case, if not the only case, in support of the contention that Congress may not enact the paragraph under consideration because the ownership of stock in railroads is not interstate commerce, and because the paragraph does not deal with a subject of interstate commerce. I refer to this as surprising because this case would seem to establish clearly that the ownership of stock in railroads by a holding company is a subject with which Congress may deal for the purpose of effectuating its policy with respect to interstate commerce. In that case, the Northern Securities Co., a holding company and not a railroad-operating company, acquired ownership of a controlling amount of the stock of two railroads, the Northern Pacific Railway Co. and the Great Northern Railway Co. The action of the Northern Securities Co. was held to be a violation of the Sherman Anti-Trust Act of July 2, 1890, and the Supreme Court upheld the decree of the lower court enjoining the holding company from permitting the stock to be voted in its behalf, and enjoining the payment to the holding company of any dividends on account of such stock. It would seem that this decree of the court, from the legal standpoint, was substantially the same as though it had required divestment of stock, and it has already been shown that the requirement of divestment of stock is within the power of Congress in a proper case, and has been exercised under the Clayton Act.

The opinion of the dissenting minority of the court was quoted as supporting the view that the mere ownership of stock is not interstate

commerce, and the opinion of the majority of the court was also quoted to show that the majority of the court held the same opinion as the minority on this question. This, however, is not important, because, regardless of the question whether the mere ownership of stock is or is not interstate commerce, the holding company was required to give up its voting power and right to dividends in respect of the stock in question in order to prevent the defeat of the policy of Congress declared in the Sherman Act against unlawful combinations and restraints in interstate commerce. It is, therefore, clear that this case stands as authority for the proposition that a holding company not itself a railroad may be required to give up its control of stock in a railroad in pursuance of a legitimate policy of Congress. The conclusion to be drawn is that if the protection of the consolidation plan is an object within the power of Congress, the means of accomplishing that end used here, namely, the requirement that stock shall be divested where its continued holding interferes or is likely to interfere with the carrying out of the consolidation plan established with respect to interstate railroads, is a means which Congress may lawfully adopt. The Sherman Act had for its purpose the furtherance of the policy of Congress against monopolies and restraints upon interstate commerce; the present bill has for its purpose what would seem to be the equally valid, although admittedly different, policy of preventing the defeat of the consolidation plan.

As has heretofore been shown, the interstate commerce power is broad and complete. It is even well settled, notwithstanding the contentions which have been made to this committee, that Congress may regulate matters which are not themselves interstate commerce, because of their relation to and influence upon interstate commerce. (Interstate Commerce Commission *v.* Goodrich Transit Co. (1912), 224 U. S. 194; United States *v.* Ferger (1919), 250 U. S. 199.)

In the case of Interstate Commerce Commission *v.* Goodrich Transit Co. (1912), (224 U. S. 194) the court upheld a provision of law authorizing the Interstate Commerce Commission to require accounts of railroads to be kept in a specified manner. The contention was made that the subject matter was not interstate commerce and that the provision was unconstitutional. The court said, however:

> Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, in interstate commerce, is carried on, in order that the commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority. * * *
>
> We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the commission to require under section 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law (p. 216).

In United States *v.* Ferger, which involved indictments under Federal bills of lading act, the court, in answer to the contention that the power of Congress did not extend to the control of fraudulent and fictitious bills of lading, said:

> * * * But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to authorities which from the foundation of the Government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution (p. 203).

These questions could, of course, have been dealt with more exhaustively, but I believe what I have said will suffice to show where the weight of authority lies. In connection with the above and related questions, I refer the committee to the legal study on the constitutional power of Congress to regulate stock ownership in railroads engaged in interstate commerce, by Prof. M. S. Breckenridge, of the law school of the University of North Carolina, which appears in House Report No. 2789, Seventy-first Congress (Part I, pp. 1–62), and particularly to the discussions at pages 35 to 40, and pages 50, 51.

Mr. HUDDLESTON. There are no more witnesses scheduled to be heard this morning, gentlemen. If there is no objection, we will adjourn subject to the call of the chairman.

It is my understanding Mr. Rayburn will be back to-morrow or the next day, and this is the program that he has outlined.

Mr. Oliver, general counsel Security Owners Association, desires to present a statement to the committee under the privilege recently granted by the committee.

STATEMENT OF FRED N. OLIVER, GENERAL COUNSEL SECURITY OWNERS ASSOCIATION, MILLS BUILDING, WASHINGTON, D. C.

Mr. OLIVER. My name is Fred N. Oliver, and I appear here as general counsel for the Security Owners Association; that is, the National Association of Owners of Railroad and Public Utilities Securities. This association, as is well known, has the support of leading owners of railway securities throughout the country, and its primary function is to speak generally on behalf of railway-security owners on matters which affect their interests. It appears here to express its disapproval of H. R. 9059 now before this committee.

We question the expediency of the measure and apprehend it would have an injurious effect upon the values of railway securities generally. It would restrict the number of people in position to buy railroad securities. The bill is referred to as one regulating the acquisition of control. It might with equal propriety be referred to as one restricting the right of present owners to sell their securities. There can be no acquisition without a sale. Restriction of the right to acquire is restriction of the right to sell. We question seriously the wisdom of taking out of the market for railway securities the resources of men in strong financial position to do things and who have the ambition to carry out constructive plans.

The power given to the commission to require present companies to divest themselves of their holdings we regard as alarming. The bill would authorize the Interstate Commerce Commission to require holding companies now in existence and owning control of important properties to sell their security holdings within a limited period at a price to represent their fair normal market value, and pending such

sale the commission is to have the power, through some trusteeship, to divest the owner of the shares of the voting power on his holdings. No weight apparently is to be given to the price paid by the holding companies for their holdings. What is to be taken as fair normal market value seemingly is to be left to the commission.

As we see it, that power could not fail to hold values of securities of the companies possessed by the holding companies down to a very low level. That necessarily would result in a loss not only to the holding companies, but to innocent stockholders generally—stockholders of the companies in which the holding companies are interested. Indirectly the bill would have a very serious effect in retarding general recovery from the depression and in the destruction of railroad credit.

This whole divestment idea seems to be a novel one. The plan does not contemplate that the Government shall be the purchaser of the stock. The stock is not to be acquired in the exercise of the right of eminent domain. There is to be no judicial determination of the value of the stock. Seemingly there is to be no appeal from the finding of the commission. Apparently the idea is that the power given to the commission to require the divestment is to be used as a means to compel the holding company to fall in with whatever consolidation plan the commission may work out.

A proposition that the Federal Government should require an owner of securities, who has purchased them in good faith, to dispose of those securities at a price which would represent a large loss seems shocking. Assuming that the securities have been bought under existing law, it would appear to be quite as shocking to require the owners of railway securities to sacrifice their holdings as it would be to require any holder of property to dispose of it at a loss, whether he desired to do so or not. It is not easy to see how such a confiscation of property rights could have legal sanction.

We feel too that the concentrated ownerships in railway companies are essential as steps toward progress with consolidations. If and when consolidations are gone ahead with, progress will be due to the fact that certain individuals having substantial interests, and constructive plans, desire to proceed with consolidations. Only such persons can initiate or formulate consolidation plans. Concentration of ownerships, therefore, is essential in order that any consolidation plan can succeed. Nor do we feel there is any reason to apprehend that the holding company ownerships will defeat any consolidation plan finally decided upon by the commission, and which has the approval of public sentiment.

It is well known that owing to the conditions which prevail generally throughout the financial world, there is little likelihood that any additional holding companies of any consequence will be formed for a considerable period. It must be, therefore, that the immediate object of this bill is to empower the commission to require holding companies which have been formed to divest themselves of their ownerships. In that aspect it is not unfair to say that this bill primarily is an attack on holding companies which have been formed during recent years. The companies which are thus aimed at have been mentioned time and time again upon this record.

There is now being discussed what is known as the 4-party plan. If the commission approves their plan, there is every reason to expect

that when all questions are finally threshed out, the companies involved in the 4-party plan will in a whole-hearted way do all they can to carry out the plan. If this plan goes through, the holding company situation now existing will be cleared up.

For these reasons, stated somewhat generally, we think the bill is unwise, inexpedient and particularly that it is inopportune at this present time.

It is the view of the commission and its advisers that the bill now before your committee raises a very serious question as to the power of Congress. By this bill, as we understand it, the Congress is asked to go farther than it has ever gone before on a serious constitutional question. Obviously the power to enact this bill can rest only on the commerce clause of the Constitution. Its legitimate purpose can only be to protect interstate commerce against interference. The bill, it seems to us, goes much farther than this. It does not merely deal with the functioning of an agency carrying on commerce. It does not merely deal with the functioning of that agency as its functioning has been dealt with heretofore in such acts as the Clayton Act, the Sherman Act, and many other pieces of legislation. It goes farther and says who may own and who may not own the agencies that carry on commerce. The bill proceeds on the theory, as we understand it, that the mere power to affect interstate commerce which ownership gives, confers upon Congress the right to say who shall and who shall not own the agency.

The bill can not be justified as preventing interference with interstate commerce, or as preventing restraint of competition. It does not cover such a case as was involved in the Northern Securities case, where competing railroads were brought under common control and the effect of the common control necessarily was to interfere with competition. The bill now before you proceeds on the theory that it is immaterial whether the joint control does or does not affect competition. It says in effect that owners of a short railroad in Maine shall not acquire a short line of railroad in California, without regard to whether they compete or do not compete. In other words, it proceeds on the theory that mere ownership gives power to affect interstate commerce, and therefore the Congress may say who shall or who shall not have that ownership.

We question whether this is within the power of the Congress. Seemingly, if the power to influence commerce that ownership gives, gives the Congress the right to say who shall enjoy that ownership, it must apply to every agency engaging in interstate commerce. If the Congress has the power to enact this bill, there would seem to be scarcely any limit as to the right of Congress to interfere with and control developments of all sorts throughout the States. We do not believe that such was the intent. We believe that the intent of the Constitution was to limit the right of Congress to regulate the functioning of the agency.

(Whereupon, at 11.25 o'clock a. m., the committee adjourned, subject to the call of the chairman.)

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